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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 551

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals dealing with the question of interest (R. 47) is reported in 19 F. (2d) 744.

The opinion of the District Court dealing with the interest question (R. 39) is reported in 16 F. (2d) 643.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 4, 1927 (R. 60); rehearing denied June 28, 1927 (R. 60). The petition for certiorari was filed September 21, 1927, and granted November 21, 1927. (R. 61.) The jurisdiction of this

Court rests on Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, in a proceeding against the United States in admiralty for collision losses, filed by authority of a private Act of Congress conferring jurisdiction upon the District Court to enter judgment for "legal damages * * * upon the same principle and measure of liability with costs as in like cases in admiralty between private parties," interest upon the several items of damages, from the dates of the losses, is recoverable.

THE STATUTE

An Act for the relief of the owner of the steam lighter *Cornelia:*

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the claim of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United

States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. [c. 192, 42 Stat. pt. 2, 1590.]

STATEMENT OF THE CASE

This is a libel *in personam* in admiralty, filed in the District Court of the United States for the District of Massachusetts by the petitioner, as owner of the steam lighter *Cornelia*, against the United States, as owner of the destroyer *Bell*, to recover damages arising out of a collision between the two vessels in the channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918. (R. 8.)

The authority for the proceeding is a private Act of Congress approved May 15, 1922, c. 192, 42 Stat. 1590.

The *Cornelia* was beached on the side of the channel and sank in the shallow water. (R. 8 et seq.) The *Bell* sustained minor damage in the collision (R. 5) but no cross libel therefor was filed.

The District Court found the *Cornelia* solely at fault (298 Fed. 768) and dismissed the libel; but, upon appeal, it was held that both vessels were at fault and that the damages should be divided. (R. 6.) On further proceedings, pursuant to the mandate, the District Court entered judgment for the petitioner in the sum of $45,542.34, one-half the damages, without interest. (R. 38.) The case again went to the Circuit Court of Appeals, which approved the holding of the District Court that interest should not be allowed.

SUMMARY OF THE ARGUMENT

(I) It is the settled policy and practice of the Government not to allow interest save in exceptional cases expressly provided for, and without such express statutory authority there can be no recovery thereof.

(II) The statute properly read, giving to each word its usual and ordinary significance, with no effort to enlarge any word or phrase to embrace that not ordinarily comprehended within it, is sufficiently clear, requires no construction and excludes interest. There is a well-recognized distinction be-

tween damages and interest, allowance of which (between private parties) is a matter of discretion and dependent upon the circumstances of each case.

Similar statutes, during a long period of years, have been enacted in the same language—interpreted by the district courts, in case after case, as excluding interest—acquiesced in and relied upon by Congress, sometimes under circumstances utterly inconsistent with the theory that by the language used it contemplated allowance of interest. The interpretation so placed by the courts and approved by Congress became a part of the law and is in accord with the policy of the Government, both generally and in this class of cases, as evidenced by judicial decisions, departmental practice and legislative enactments, including the Act of March 3, 1925, authorizing the courts to hear and determine claims arising out of collisions with public vessels since April 6, 1920.

The correctness of the conclusion reached in the district courts was never seriously questioned prior to the decision of the Circuit Court of Appeals, Second Circuit, in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, on January 10, 1927—*after* enactment of the present statute. And that decision was promptly repudiated by Congress, in that all bills of this character then pending were amended so as expressly to forbid allowance of interest—a practice thereafter adhered to.

ARGUMENT

I

INTEREST MAY NOT BE AWARDED AGAINST THE UNITED STATES INDEPENDENTLY OF EXPRESS STATUTORY AUTHORITY

(*a*) *It is the settled policy and practice of the Government not to allow interest save in exceptional cases expressly provided for*

It can not require citation of authority to prove that the United States may not be sued for a tort until and unless it shall have consented, nor can it be doubted that Congress at its pleasure may authorize recovery of all or only a part of the amount claimed. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North American Co.*, 253 U. S. 330, 336; and *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, lay down the rule.

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. [*Angarica* v. *Bayard*, *supra*.]

A salutary reason for such a policy is that the delay intervening between the time that the claim arose and the time of its adjudication may often be attributed, in whole or in part, to lack of diligence on the part of the claimant in pressing his demand. *United States* v. *North American Co.* (p. 338), *supra*.

The Act of June 24, 1910, c. 378, 36 Stat. 605, 607, as amended by the Act of December 28, 1922, c. 16, 42 Stat. 1066 (U. S. C. Title 34, Sec. 599), authorized the Secretary of the Navy to "adjust and determine the amounts due" on small claims arising out of collisions with public vessels, and other statutes have conferred similar authority upon the heads of other departments. The public records show that the practice of the executive departments referred to in *Angarica* v. *Bayard, supra,* of disallowing interest, has not been departed from in such cases.

The Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C. Title 46, Secs. 742, 743), authorized libels *in personam* against merchant vessels of the United States operated and managed by the Emergency Fleet Corporation, to proceed "according to the principles of law and to the rules of practice obtaining in like cases between private parties," with interest, limited to four per centum, to "run as ordered by the court."

The Act of March 3, 1925, c. 428, 43 Stat. 1112 (U. S. C. Title 46, Secs. 781, 782), authorized libels *in personam* against, and the impleading of, the United States for damages caused by public vessels after April 6, 1920. The Senate Committee on Claims, when reporting the bill (Sen. Rep. 941, p. 1, 68th Cong. 2d Sess.), thus stated its purpose:

> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which private

> owners have been allowed to submit to our admiralty courts admiralty claims of this character.

The Attorney General, writing the Chairman of the Committee, on April 8, 1924, regarding the proposed bill (Sen. Rep. 941, p. 12, 68th Cong., 2d Sess.), made the following observations:

> Section 2 of the proposed bill provides that actions brought by authority of the bill shall be subject to and proceed according to the Suits in Admiralty Act. The Act allows interest in the discretion of the court from the time the cause of action arises. As applied by the proposed bill, interest would run in collision, salvage, and contract cases from the time the cause of action arose. Relief now granted against the Government in contract matters in the Court of Claims and district courts under the Tucker Act deny interest and allow it only upon the judgment or decree entered. ***In the special Acts heretofore passed granting relief in collision matters the right to recover interest has generally been denied.*** Allowance of interest from the time the cause of action arises in contract matters appears to have more merit than the allowance of interest in tort matters. The policy of the Government should be to allow interest in both classes of actions or to deny interest in both classes of cases. However, as I have stated, this is a legislative matter rather than a question for me to review. (Italics supplied.)

It is significant that the bill was amended and, as finally enacted, contained this provision:

> No interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

(*b*) *Petitioner concedes the rule but relies upon a so-called exception—here analyzed*

Petitioner contends that this case comes, not within the general rule of *Angarica* v. *Bayard*, *supra*, but within the so-called exception—

> where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages—

and refers to an opinion of Attorney General Cushing, September 20, 1855, 7 Op. Atty. Gen. 523, 524–526, 531, for an elaboration thereof.

Mr. Cushing declared (p. 526):

> To the general rule thus laid down, there may possibly be, as Mr. Legare suggests, "some rare and singular exceptions." I confess myself at a loss, however, to say what they are, or, at any rate, to derive a rule from such exceptions.

However, as an "apparent, but not real, exception, if the case exists," he suggests that a statute may authorize recovery of "damages" in a case where "a statute-interest on the detention of money is the established rendering of the term," and illustrates the proposition by a reference to 1 Stat. 85—the Judiciary Act of September 24, 1789, c. 20, 1

Stat. 73, 85, Sec. 23 of which provided that a writ of error should be a *supersedeas* and that, upon affirmance, the court should "adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

But that would be quite a different case. And Mr. Cushing's language falls far short of saying that " the word ' damages ' in a private enabling statute will be sufficient to give to a claimant the right to interest against the Government whenever interest would be allowed as damages in like circumstances if the claim had arisen between private parties." (Pet. Brief, p. 6.) The care which he displayed elsewhere in the opinion negatives the suggestion that so important an exception would be hidden within language so general and illustrated by an example so inept.

II

THE STATUTE DOES NOT AUTHORIZE ALLOWANCE OF INTEREST

(*a*) ***The language used in this and many similar Acts has received a settled construction by the courts and the executive departments, as excluding interest, and Congress has repeatedly evidenced its approval and acquiescence***

During a long period of years Congress has passed many private Acts such as this. Counsel for the petitioner concede that during the last fifteen years there have been ninety-six of them.

"comparable in phraseology to that here in question" (Brief, pp. 16–17)—and there have been numerous others. In the Appendix there are listed about seventy such statutes, enacted during the present century, which may be considered as representative of the whole number, with citations and references to enlightening incidents in their legislative history.

From the very first, and almost without exception, the District Courts, in case after case, have interpreted them as excluding interest. Their conclusions respecting the intent of Congress accord with the conclusions of the Secretary of the Navy, the Secretary of the Treasury and other executive officers when adjusting small claims of similar nature under power conferred by general statutes, and are in harmony with the policy of the Government, both generally and in this particular class of cases—unmistakably declared in the statute authorizing the district courts to hear and determine claims arising out of collisions with public vessels since April 6, 1920. (See pp. 7–9, *supra*).

Very few of these cases have been reported, even where well-reasoned opinions have been handed down, as in *Nippon Yusen Kabushiki Kaisha* v. *United States* (copied, in part, in the Appendix). One apparent reason for this is that the matter has been thought beyond the field of controversy; the judges have not usually deemed it necessary to expound upon it; authors and compilers have uniformly accepted the principle without question.

Benedict on Admiralty (5th ed.), Sec. 419; Sutherland on Damages (4th ed.), Sec. 1294 (v. 5, p. 5013); 1 Corpus Juris 1363, etc., etc. There has been no need for the cumulative evidence of a great number of additional unappealed decisions of District Courts.

They are all available on the records of those courts and of the executive departments. It is believed, however, that reference to the information contained in the Appendix, as well as to the following cases, will be sufficient to indicate what the practice has been. *Watts* v. *United States* (S. D. N. Y., 1904), 129 Fed. 222, 226; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75, 76, *et seq.*; *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass., 1924), 297 Fed. 656; *Whitelaw* v. *United States* (Behring Sea Case, N. D. Calif., 1925), 9 F. (2d) 103, 104; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y., 1926—not reported; see Appendix); *Long Island R. R. Co.* v. *United States* (E. D. N. Y., 1926—opinion, denying interest, not reported, but summarized in 1926 A. M. C., p. 1011; and see *infra*); *New York & Cuba Mail S. S. Co.* v. *United States* (S. D. N. Y., 1924, disallowing interest without comment), 300 Fed. 827, reversed in 16 F. (2d) 945; *Commonwealth & Dominion Line Ltd.* v. *United States* (E. D. N. Y., 1926—short opinion denying interest, not reported), reversed in part in 20 F. (2d) 729, now pending in this Court on writ of certiorari; *Alaska Commercial Co.* v. *United*

States (N. D. Calif., 1925—explanation of Judge Kerrigan, *infra*, p. 24); and also, of course, the opinions below in this case.

Watts v. *United States*, although dealing with a statute (copied in Appendix) worded somewhat differently from most of them, has been much relied upon for nearly twenty-five years. The ruling therein on the question of interest was announced in this language:

> It is contended that the disallowance of interest is unjust and excludes the libellants from a full recovery of the damages sustained. Such appears to be the fact. Without interest, the recovery is only partial but it is too well established to admit of argument that the Government is not liable for interest on damage claims in the absence of an express statutory provision or stipulation covering it.
>
> * * * * *
>
> The claimants here, while conceding that if the matter had been referred by Congress to the Court of Claims, interest would not be recoverable, urge that as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that under the authorities cited, interest is not allowable, unless expressly provided for, and there being a complete absence of any allusion to interest in the Act, under which the action has been tried here, it should not be granted.

The late, and seemingly well-considered (although unreported), opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*, *supra*, declared:

> I am not convinced that by the use of the words "upon the same principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided. . . .
>
> A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507), in which case, at page 518, Mr. Justice Bradley, writing for the Court, says: "The allowance of interest on damages is not an absolute right."
>
> Therefore, by the use of the words, "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this Court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this Court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this Court power to make an award of interest from the date of collision to the date of the entry of the decree herein.

Congress, with undoubted knowledge of the construction thus placed, has, through a long period of years, continued to use the same language, time after time, often under circumstances utterly incon-

sistent with the theory that it contemplated allowance of interest.

Frequent effort has been made in Congress to add the words, "including interest," to particular Acts so that recovery should be authorized, "*not only for the damage, but for the interest on the damage.*" (See Appendix.) In four instances, upon consideration of the merits, the words were added and the parties permitted to recover interest. In many more instances, however, it will be noticed that Congress refused to add the words or, where they had been inserted, to permit them to remain in the bill. Sometimes, it will be noticed, the Senate and House were divided on the question of their retention. The proceedings indicate beyond question that these deliberations were not founded upon any question of style or grammatical propriety, but upon the consideration of whether or not, in fact, interest in the particular case should be allowed; and the courts have so concluded. See, for example, the following paragraph from Judge Campbell's opinion in *Long Island R. R. Co.* v. *United States* (E. D. N. Y., June 2, 1926, not reported, but summarized in 1926 A. M. C., p. 1011):

> A further reason for denying interest may be found, if a further reason be necessary, because it appears that the bill in the suit at bar, as reported to Congress, included a provision for interest, and that the bill was amended in the House of Representatives by striking out the words "including interest" after the word "damages."

There can be no room for doubt that Congress acquiesced in and adopted the construction placed on such statutes by the district courts, which thus became a part of the law. *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *United States* v. *Merriam*, 263 U. S. 179, 187, and cases there cited.

If, on the other hand, we accept petitioner's view, the proceedings in Congress become meaningless; the insertion of the words, "including interest," was mere tautology.

But it would be quite too much to believe that the various district courts, during a long period of years, would almost uniformly misinterpret the same language in so many cases and, yet, that Congress with undoubted knowledge thereof would continue to use that language time after time, without change and (so far as we have been able to find) without a single suggestion of disapproval, even from individual members intent upon obtaining interest for constituents in particular cases.

If there could be any doubt of the intention of Congress, its understanding of the language repeatedly used, and its asquiescence in the construction long placed on these statutes by the district courts and executive departments, it would seem to be set at rest by the course adopted after the decision in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, in which for the first time an appellate court decided that the language theretofore usually employed contemplated allowance

of interest. That decision was announced on January 10, 1927. On February 24, 1927, c. 190, 44 Stat. pt. 3, 1790, an Act was passed "for the relief of Delaware River Towing Line," owner of a tugboat damaged in collision with a public vessel of the United States prior to the effective date of the relief granted in the Act of March 3, 1925, *supra*. The District Court, Eastern District of Pennsylvania, "sitting as a court of admiralty and acting under the rules governing such court," was empowered to hear and determine the claim and to render judgment or decree for the amount of the damages and costs—

> upon the same principles and measures of liability as in like cases between private parties and with the same rights of appeal *except that no interest shall be allowed on any claim.* (Italics supplied.)

A number of such Acts, then under consideration and in various stages of legislative approval (some already having passed one house), were promptly amended, on the floor or in committee, so as expressly to negative any idea that the general language contemplated interest. (See, for example, Cong. Rec., v. 68, pt. 4, p. 3995, Feb. 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2060, 2063; Sen. Repts. 1682, 1683—all 69th Cong., 2d Sess.) And every one thereafter passed has been so worded (see Appendix), save in one instance—the Act of March 3, 1927, c. 468, 44 Stat. pt. 3, 1839, 1840, authorized a judgment or decree, "*including inter-*

est and costs." The apparent reason for this exception is indicated by Sen. Rept. 1638, 69th Cong., 2d Sess.—a delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility.

(*b*) *If we ignore the construction placed upon these statutes as a whole, and test the isolated words and phrases thereof by general principles, as petitioner has done, even then they do not contain language sufficient to include interest*

In the first place, we must accept the principle that there is a distinction between damages and interest, allowance of which is a matter of discretion and dependent upon the circumstances of each case. The Scotland, 118 U. S. 507, 518, 519—

> The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. * * * *In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included.* (Italics supplied.)

And, to the same effect, see *The Maggie J. Smith*, 123 U. S. 349, 356; *The Albert Dumois*, 177 U. S. 240, 255; *Eastern S. S. Corp* v. *Great Lakes Dredge, etc., Co.*, 256 Fed. 497, 505; 1 Corpus Juris 1362, and cases cited.

No authority cited by petitioner rejects this rule; some expressly declare it; and their cumulative effect is, not that "interest is to be awarded," but that it *may* be awarded (between private parties).

The Umbria, 166 U. S. 404, 421, did not consider whether or not interest *should* be allowed, but held that recovery was "limited to the value of the vessel, with interest thereon," etc.—that "probable profits of a charter party" should not be allowed—which was the real issue.

But it is only necessary to quote from the authorities cited by petitioner. (Brief, pp. 7-12.)

Sutherland on Damages (4th ed.):

> SEC. 1290. * * * While the measure of damages for loss of a vessel is, in the first instance, the market value, in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost. * * *
>
> SEC. 1294. * * * Interest on the value of the vessel or cargo is recoverable from the date of the casualty, unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion. * * *

Benedict on Admiralty (5th ed.), SEC. 419:

> The allowance of interest on damages in cases of collision, or other unliquidated damages, is always in the discretion of the court * * *.

Roscoe on Damages in Marine Collisions (2d ed.), p. 105 (note):

> It should therefore be considered that [in the United States] interest will be allowed according to the discretion of the Court in relation to particular uses and that there is no definite rule on the subject.

The Reno, 134 Fed. 555, 556:

> The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity.

The Kate (1899), Prob. Div. 165, 175:

> If the vessel be under charter it appears to me that a case arises in which the profits under the charter party should take the place of interest, as more accurately representing the loss to the owner. * * * The proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter party, and this is what the learned registrar has allowed.

The Rhode Island, 20 Fed. Cas. 636, 638:

> In adopting, in this instance, interest or a percentage on the value of the boat for the time she was kept out of the libellant's use by means of the collision, I do not assume to lay that down as a particular always to be admitted in determining the damages occasioned by a wrongful collision. I regard it, in the present instance, as a reasonable mode of compensating the party for what is a posi-

> tive loss to him, and as one which avoids the vague and objectionable valuation of the probable earnings of the boat, had she not been so prevented following her usual employment.

The discretion existing, it can hardly be said that "damages" necessarily includes interest, even as respects private litigants; and it would seem to make little difference whether or not, as suggested (Pet. Brief, p. 10), interest is usually allowed. Possibly the same would be true at law, as, in fact, petitioner urges it is. (Brief, pp. 7, 13.) Are we to infer, then, that the term, "damages," always includes interest, even in nonmaritime matters; that its use in Sec. 24, Jud. Code as amended (U. S. C. Title 28, Sec. 41 (20)), authorizes the district courts to award interest against the United States in all *ex contractu* claims not exceeding $10,000?

Seeking to avoid application of the maxim, *expressio unius est exclusio alterius*, petitioner argues (Brief, p. 14), that "damages" does not include costs. Roscoe, *id.* pp. 64–65, declares costs to be affected by the same considerations applicable to interest and to be comprehended within the rule of *restitutio in integrum*—

> It has been the practice in the Admiralty Registry to allow the taxed costs of the plaintiff and the costs of the defendant (plaintiff in collision action) as between solicitor and client as damages. * * *

[Note] Probably the same rule generally prevails in the United States.

Petitioner inquires (Brief, p. 14): "Can it be supposed that Congress gave this trifle [costs] yet withheld what is essential to a just and full reparation?" It is necessary only to refer to Secs. 152 and 177, Jud. Code (U. S. C. Title 28, Secs. 258, 284), one of which expressly authorizes costs to suitors in the Court of Claims and the other expressly forbids allowance of interest—indicative of the general policy.

Courts of Admiralty, it is said, are governed by equitable principles (Pet. Brief, p. 10) and award interest in order to accomplish "a full and complete indemnity." It has been decided, however, that even express authorization of adjudication on equitable principles is not sufficient to authorize allowance of interest against the Government. *Tillson v. United States*, 100 U. S. 43, 46; *United States v. Omaha Indians*, 253 U. S. 275, 283; 7 Op. Atty. Gen. 523, 524–526.

As a further distinction between the present case and those cited by petitioner, it may be pointed out that the award of interest on the principal amount of the damage presupposes the existence of a legal obligation from the time of the happening and the withholding by the defendant of a sum of money which (legally) "ought to have been paid to the claimant, and [the defendant] having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the

principal was payable." Sir Charles Butt in *The Kong Magnus* (1891), Prob. Div. 223, 235. In the case of a claim against the Government, however, until Congress has acted and liability has been established as directed by law, there is no legal obligation existent. *United States* v. *Sherman*, 98 U. S. 565, 567—

> Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. * * *
>
> * * * It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the government was not bound to pay.

And interest, usually insignificant in comparison with the principal sum claimed, would sometimes assume alarming proportions in claims against the Government. Note, for example, *Pennell* v. *United States*, 162 Fed. 75, where forty-two years' interest was claimed. Congress is perhaps the best judge of the responsibility for such delay, and, where the Government has been clearly at fault, has at times expressly authorized allowance of interest. (See instances indicated in the Appendix.)

(c) *The recent cases in the Second Circuit allowing interest are not well considered, and represent conspicuous departures from the accepted view*

Of the cases referred to by petitioner (Brief, pp. 21–22), as allowing interest, *The Friedrich der Grosse*, 1926, A. M. C. 361, and *Texas Co.* v. *United States*, 11 F. (2d) 981, affirmed in 16 F. (2d) 948, are the same case reported under different names. The opinion in *Alaska Commercial Co.* v. *United States*, 1925, A. M. C. 1269, did originally contain the words, "with interest and costs." Attention is invited, however, to the following communication addressed to Government counsel by Judge Kerrigan, May 18, 1925:

> In preparing my memorandum opinion in the case of *Alaska Commercial Co.* v. *United States of America*, I inadvertently overlooked the fact that interest was under the terms of the statute in question not allowed. Hence, I have stricken from the face of the opinion as filed the word "interest."

A certified copy of the decree shows that interest was not awarded.

This leaves for us to consider, only *The Commonwealth*, 297 Fed. 651; *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945; *Texas Co.* v. *United States; and Commonwealth & Dominion Line, Ltd.* v. *United States*, 20 F. (2d) 729, (now pending in this Court on writ of certiorari)—all in the Second Circuit. The two last mentioned followed *New York & Cuba Mail S. S. Co.* v. *United States*, in the Circuit Court of Appeals, without further discussion. *The Commonwealth* did not reach the Circuit Court of Appeals because, for reasons not connected in any way with the question of interest, the case was settled out of court and the appeal abandoned.

Pursuant to "An Act for the relief of the New England Steamship Company," February 20, 1914, c. 25, 38 Stat. 1244, which provided for initial action by the United States, the latter libeled the Steamship *Commonwealth* to recover damages resulting from a collision between that vessel and the battleship *New Hampshire*. By authority of the same Act, the owner of the *Commonwealth* filed a cross libel to recover its damages. Both claimed interest. The court, devoting but a few meager sentences to the question of interest, announced its holding in the following language:

> The Private Act does not regulate merely the action by the New England Steamship Company; it expressly covers both actions;

> it provides for judgment or decree either for or against the United States upon the same principles and measure of liability as in like cases in admiralty between private parties.
>
> Concededly, if both were private parties, interest would be allowed; the United States asserts its right to interest, but it denies the counter right. In my judgment, if the United States is entitled to interest, then under the fair construction of the act, a similar right is given to the other party. That the United States is so entitled has not been and cannot be denied.

Thus, while the proceeding was instituted under and in accordance with the direction of the private Act, which did not provide for interest, the court assumed, without question, that the United States would be entitled thereto—giving no thought to the possible exclusiveness of the remedy so provided or the effect upon general principles otherwise applicable—and then made this assumption the basis of its holding that "if the United States is entitled to interest * * * a similar right is given to the other party."

The foregoing decision was by Judge Mack. In *New York & Cuba Mail S. S. Co.* v. *United States*, 300 Fed. 827, District Judge Winslow declined to follow it, and disallowed interest without comment. In *Texas Co.* v. *United States*, 11 F. (2d), 981, Judge Goddard allowed interest. He held that if the United States, under the private Act, may demand damages it is entitled to interest, and that if it had

a right to claim interest, then, regardless of whether it did or not, the private libelant might do so.

And this, it will be remembered, is based upon a mere assumption of a district judge on a proposition which was not controverted before him. Whether or not the United States when proceeding under such an Act, is entitled to interest, would seem in itself a question worthy of consideration. If it may demand interest, it does not necessarily follow that the private libelant may do so. *United States* v. *Verdier*, 164 U. S. 213, 218; *United States* v. *North American Co.*, 253 U. S. 330, 336.

The Circuit Court of Appeals, Second Circuit, reversing the decision of Judge Winslow and affirming that of Judge Goddard, awarded interest in both cases. It recognized the need of statutory authority, but thought this might be inferred from the intention (which it professed to find) that the principle of *restitutio in integrum* should apply.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; and *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, were cited. As hereinafter pointed out, these were adversary proceedings instituted by or for the benefit of the United States, which thus "voluntarily submitted themselves to the court," with no statute defining and limiting the extent of such submission; and in all the facts and applicable principles were altogether different from those here under consideration.

Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299, also cited, is helpful only as laying down the general rule. The exception there found applicable, that interest may be allowed as part of the "just compensation" awarded for private property taken, is explained by this excerpt from the opinion (p. 304):

> Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.

But the chief fault of the opinion in *New York & Cuba Mail S. S. Co.* v. *United States* is that it gave no consideration whatever to the long series of similar private Acts, the policy of Congress as manifested by those Acts and general legislation, and its long-continued acquiescence in and reliance upon the judicial construction placed upon the language used time after time, often under circumstances inconsistent with the theory that allowance of interest was intended. In fact, it is apparent, as suggested below, that the court was not fully and properly advised concerning them.

(d) Other authorities cited by petitioner have dealt with principles altogether different from those here applicable

The Charming Betsy, 2 Cranch 64. Captain Murray of the U. S. Frigate *Constellation* was held personally liable for a tortious seizure as prize of war. Interest was allowed without discussion. The

report contains a footnote to the effect that Captain Murray was later reimbursed by Act of Congress.

The Anna Maria, 2 Wheat. 327, 335, and *The Amiable Nancy*, 3 Wheat. 546, 560, concerned liability arising out of tortious seizures by privateers owned by American citizens. There is no discussion respecting allowance of interest, and it does not appear what, if any, interest the United States had in the result—the captures being unlawful.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; *The Lubuan*, Blatchford's Prize Cases, 165, and *The Sybil*, *id.* 615, concerned vessels unlawfully seized and libeled in the name of the United States as prizes of war. It would seem that primarily the responsibility would be that of the officers who acted without authority of law, as in the case of Captain Murray, in *The Charming Betsy*, *supra*. However, it appears that the United States "voluntarily submitted themselves to the court," with no statute defining the extent of such submission or limiting the right of the court to award interest. In the first mentioned case it appears interest was awarded. In *The Paquete Habana* the Court mentioned, among other details, as proving the findings were not justified, that "interest was charged at eight per cent, there being no reason apparent for charging more than six if interest was allowed." The reported opinions in the other two cases make

no reference to interest. In fact, in none of them was the question expressly considered, nor is there any indication that it was an issue.

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. [*Webster* v. *Fall*, 266 U. S. 507, 511.]

As indicated by petitioner, international usage may have affected the matter in some way.

Erskine v. *Van Arsdale*, 15 Wall. 75, was an action against a public officer for money illegally exacted as taxes. The judgment was against the officer personally for a tort committed by him, and the fact that the United States would probably pay the amount of the judgment did not affect the measure of damages. *The Apollon*, 9 Wheat. 362, 377, was a proceeding against a Customs Officer for an unlawful seizure and involved the same principles.

Miller v. *Robertson*, 266 U. S. 243, 257, while recognizing the principle of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603, that a suit against the Alien Property Custodian is, in effect, against the United States, nevertheless allowed interest. The Court carefully pointed out, however, that—

> the claim was not against it [the United States]. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest • • • does not apply.

Standard Oil Company v. *United States*, 267 U. S. 76, 79, allowing interest, is explained by this sentence from the opinion:

> When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.

United States v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220; *Phelps* v. *United States*, *id.*, 341, 344; and *Compagnie Generale Transatlantique* v. *United States of America* (Hull No. 5), —— Ct. Cls. —— (February 14, 1927), 1927 A. M. C. 485, were proceedings to recover the "just compensation" guaranteed by the Constitution for private property taken for public use. They recognize a difference between proceedings to recover "just compensation" and an ordinary demand or claim against the Government.

United States v. *The Thekla*, 266 U. S. 328, 340, 341, [followed in *The Barendrecht*, 11 F. (2d) 377] involved cross libels arising out of a collision with a vessel owned by the United States *pro hac vice* and operated through the United States Shipping Board Emergency Fleet Corporation—which the Court declared might be held liable for interest.

The petitioner relies upon the general language contained in the latter part of the following sentence—but refrains from quoting the first part, which seems to indicate a distinction between that case and this:

> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.

United States v. *McKee*, 91 U. S. 442, 450. A claim for money and supplies furnished troops during the Revolutionary War was referred to the Court of Claims with direction that—

> In making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases.

The claim was one of the class provided for by the Act of August 5, 1790, c. 38, 1 Stat. 178, 179, expressly allowing interest, and would have been brought thereunder except that the period of limitation had run.

CONCLUSION

It is respectfully submitted that the conclusion of the Circuit Court of Appeals is required by the language of this Act, standing alone, when read in the

light of accepted canons of construction; is in accord with the evident intention of Congress not to allow interest in these collision cases (save in exceptional instances upon consideration of the merits), as evidenced by numerous authoritative declarations; and is in harmony with the almost uniform holdings of the district courts when construing many similar private Acts during a long period of years, acquiesced in and relied upon by Congress when using the same language time after time, often under circumstances repugnant to any idea that allowance of interest was contemplated.

The decree of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
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GEORGE R. FARNUM,
Assistant Attorney General.
JOHN T. FOWLER, JR.,
Attorney.

FEBRUARY, 1928.

APPENDIX A

LIST OF ACTS FOR RELIEF OF PRIVATE OWNERS ON ACCOUNT OF DAMAGES SUSTAINED THROUGH COLLISIONS WITH PUBLIC VESSELS

This list does not include all such statutes. It contains all of those (about thirty-five) under which decrees have been entered against the United States and paid, without interest, during a period of twenty years (1906–1926), and a number of others, including particularly those Acts which have come to attention and seem pertinent because construed in the cited cases, because expressly allowing or denying interest, or because of enlightening incidents in their legislative history. The records of the Treasury Department (which has supplied the information respecting payments) indicate that in four instances the decrees included interest, not expressly authorized; in three of these the parties accepted payment without interest and waived any claim thereto.

Except where indicated the statute contains no reference to interest. In some, as pointed out, the bill read, "including interest," but the words were stricken out by amendment.

Mar. 2, 1901, c. 824, 31 Stat. 1789.

The bill, worded, "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. House Rept. 723, 56th Cong. 1st Sess.; see *Watts* v. *United States*, 129 Fed. 222, 228.

May 27, 1902, c. 887, 32 Stat. 207, 242.

Mar. 4, 1909, c. 334, 35 Stat. 1622.

Feb. 20, 1914, c. 25, 38 Stat. 1244.
Apr. 26, 1916, c. 87, 39 Stat. 1261.
Aug. 9, 1916, c. 312, 39 Stat. 1353.

The bill originally read, "damages, interest, and costs." The Secretary of the Navy reported—

> It has been the general practice of the Congress in bills of this character not to allow interest against the United States. It is accordingly suggested that the word "interest" * * * be stricken out.

This was done by amendment. Sen. Rept. 616; Cong. Rec. v. 53, pt. 10, p. 9532, 64th Cong. 1st Sess.

Aug. 21, 1916, c. 391, 39 Stat. 1393.

Attorney for the claimant urgently insisted, because of the circumstances, "that if ever there was a case in which interest should be allowed this is such a case," and that recovery should be authorized—

> not only for the damage, but for the interest on the damage.

The Secretary of the Navy recommended passage of the bill, which read "including interest." On recommendation of the Committee, however, Congress eliminated these words by amendment. House Rept. 620; Cong. Rec. v. 53, pt. 10, p. 9418, 64th Cong. 1st Sess.

Feb. 14, 1917, c. 65, 39 Stat. 1474.
Dec. 31, 1919, c. 36, 41 Stat. 1457.
Mar. 30, 1920, c. 114, 41 Stat. 1461.
Apr. 16, 1920, c. 148, 41 Stat. 1467.
Apr. 16, 1920, c. 149, 41 Stat. 1467.
May 6, 1920, c. 169, 41 Stat. 1469.
June 5, 1920, c. 283, 41 Stat. 1521.

June 5, 1920, c. 284, 41 Stat. 1521.
Dec. 26, 1920, c. 5, 41 Stat. 1523.
Mar. 3, 1921, c. 144, 41 Stat. 1553.
Mar. 3, 1921, c. 145, 41 Stat. 1553.
Aug. 9, 1921, c. 59, 42 Stat. 1565.
Nov. 17, 1921, c. 127, 42 Stat. 1569.
Feb. 18, 1922, c. 61, 42 Stat. 1578.
Feb. 18, 1922, c. 62, 42 Stat. 1578.
Apr. 28, 1922, c. 163, 42 Stat. 1587
May 15, 1922, c. 191, 42 Stat. 1589.
May 15, 1922, c. 192, 42 Stat. 1590.
May 15, 1922 c. 193, 42 Stat. 1590.
Sept. 18, 1922, c. 333, 42 Stat. 1602.
Feb 26, 1923, c. 133, 42 Stat. 1774.
Feb 26, 1923, c. 134, 42 Stat. 1775.
Feb. 26, 1923, c. 135, 42 Stat. 1776.
Feb. 26, 1923, c. 136, 42 Stat. 1776.
Feb. 26, 1923, c. 137, 42 Stat. 1777.
Feb. 26, 1923, c. 138, 42 Stat. 1777.
Feb. 27, 1923, c. 143, 42 Stat. 1778.
Feb. 28, 1923, c. 153, 42 Stat. 1778.
Mar. 2, 1923, c. 201, 42 Stat. 1786.
Mar. 2, 1923, c. 206, 42 Stat. 1787.
Apr. 12, 1924, c. 100, 43 Stat. 1361.
May 19, 1924, c. 159, 43 Stat. 1364.

The words, "including interest," originally inserted in the bill were stricken out by amendment. Cong. Rec. v. 65, pt. 5, p. 4686, 68th Cong. 1st Sess.

June 3, 1924, c. 245, 43 Stat. 1369.
"Including interest."
June 3, 1924, c. 246, 43 Stat. 1370.
June 3, 1924, c. 247, 43 Stat. 1370.
June 7, 1924, c. 280, 43 Stat. 1374.
"Including interest."

Jan. 28, 1925, c. 105, 43 Stat. 1547.

Jan. 28, 1925, c. 107, 43 Stat. 1547.

Feb. 7, 1925, c. 160, 43 Stat. 1555.

Feb. 16, 1925, c. 237, 43 Stat. 1563.

The words, "including interest," originally inserted in the bill, were stricken out by amendment. Cong. Rec., v. 66, pt. 4, p. 3458, 68th Cong., 2d Sess.

Feb. 16, 1925, c. 238, 43 Stat. 1564.

The words, "including interest," originally inserted in the bill, were stricken out by amendment. Cong. Rec., v. 66, pt. 4, p. 3458, 68th Cong., 2d Sess.

Feb. 16, 1925, c. 239, 43 Stat. 1564.

The bill, worded "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. Cong. Rec., v. 66, pt. 4, pp. 3459, 3537, 68th Cong., 2d Sess. Note the following explanation in the Senate of the House amendment:

> Mr. UNDERWOOD. Mr. President, there are three bills from the House of the same nature on the desk, with the same amendment, which reduces the amount the claimant is to receive. I ask that they may receive immediate consideration. * * * As the bills passed the Senate they allowed interest. The House strikes out the allowance of interest and reduces the amount. [Cong. Rec. v. 66, pt. 4, p. 3537, 68th Cong. 2d Sess.]

Feb. 16, 1925, c. 240, 43 Stat. 1565.

Feb. 16, 1925, c. 244, 43 Stat. 1567.

Feb. 16, 1925, c. 246, 43 Stat. 1568.

Feb. 16, 1925, c. 251, 43 Stat. 1571.

The bill, worded "with interest," passed the Senate. The House eliminated those words by amend-

ment and the Senate concurred. Cong. Rec. v. 66, pt. 4, pp. 3463, 3491, 68th Cong. 2d Sess.

Feb. 28, 1925, c. 380, 43 Stat. 1581.

Mar. 3, 1925, c. 504, 43 Stat. 1589.

"Including interest." The House had amended the bill so as to eliminate these words, but the Senate declined to concur, and they were retained. Cong. Rec. v. 66, pt. 5, p. 4834, 68th Cong. 2d Sess.

May 1, 1926, c. 213, 44 Stat. pt. 3, 1464.

May 7, 1926, c. 270, 44 Stat. pt. 3, 1470.

> Mr. KING. Do I understand that the interest provision has been stricken out of the bills which have just been passed, so that the judgments shall not bear interest?
>
> Mr. CORTLAND [who had reported the measures]. Yes. The words "including interest" were stricken out of the bills. (Cong. Rec. v. 67, pt. 4, p. 4060, 69th Cong. 1st Sess.)

The reference was to the two preceding items, and to several others not here listed. Three had contained the words, "including interest," just eliminated by amendment. Cong. Rec. v. 67, pt. 4, pp. 4058–4060, 69th Cong. 1st Sess.

Feb. 14, 1927, c. 151, 44 Stat. pt. 3, 1773.

Feb. 24, 1927, c. 190, 44 Stat. pt. 3, 1780.

"Except that no interest shall be allowed on any claim."

> Mr. UNDERHILL. Mr. Speaker, I offer the same amendment as will be offered on all these bills. * * * [Add] "except that no interest shall be allowed on any claim." (Cong. Rec. v. 68, pt. 4, p. 3995, Feb. 16, 1927, 69th Cong. 2d Sess.)

Every bill of this character then pending (save one, listed below, expressly allowing interest) was similarly amended, on the floor or in committee, before passage. Cong. Rec. v. 68, pt. 4, pp. 3988, 3995, Feb. 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2060, 2063; Sen. Repts. 1682, 1683—all 69th Cong. 2d Sess. Apparently Congress had in mind the recent decision in *New York & Cuba Mail S. S. Co. v. United States*, 16 F. (2d) 945, construing the language of these Acts as authorizing interest.

Feb. 26, 1926, c. 222, 44 Stat. pt. 3, 1793.

"Except that no interest shall be paid on any claim."

Mar. 3, 1927, c. 409, 44 Stat. pt. 3, 1807.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 410, 44 Stat. pt. 3, 1808.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 411, 44 Stat., pt. 3, 1808.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 437, 44 Stat. pt. 3, 1829.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 438, 44 Stat. pt. 3, 1830.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 447, 44 Stat. pt. 3, 1833.

Specific sum appropriated as "the total cost of repairing the damages." This did not include interest. House Rept. 1804, 69th Cong. 2d Sess.

Mar. 3, 1927, c. 468, 44 Stat. pt. 3, 1839.

"Including interest and costs." The apparent reason for this exception is indicated by Sen. Rept.

1638, 69th Cong. 2d Sess.—a delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility.

Mar. 4, 1927, c. 521, 44 Stat. pt. 3, 1846.

"Except that no interest shall be allowed on any claim."

APPENDIX B

TEXT OF PRIVATE ACTS CONSTRUED IN REPRESENTATIVE CASES

An Act Authorizing the owners of the steamship Texas to bring suit against the United States of America

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owners of the steamer Texas arising out of a collision between said steamer and the United States steamer Frederick der Grosse, off Tompkinsville, Staten Island, in the harbor of New York, on the 3d day of September, 1917, for and on account of the losses alleged to have been suffered in said collision by the owners of said steamer Texas by reason of damages to and detention of said steamer may be submitted to the United States District Court for the Southern District of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability, with costs, as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be

the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of November 17, 1921, c. 127, 42 Stat. 1569.—construed in *Texas Co. v. United States*, 16 F. (2d) 948.)

An Act For the relief of the owners of the steamship Esperanza

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the New York and Cuba Mail Steamship Company, owner of the American steamship Esperanza, against the United States for damages alleged to have been caused by collision between said vessel and the United States destroyer Connor on the 15th day of February, 1918, off Barnegat Light, New Jersey, may be sued for by the owner of the said American steamship Esperanza in the United States District Court for the Southern District of New York, sitting as a court of admiralty, and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the said American steamship Esperanza, or against the owner of the said American steamship Esperanza, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties, and with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney

General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of February 28, 1923, c. 153, 42 Stat. 1778–1779.—construed in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945.)

AN ACT For the allowance of certain claims * * * and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled * * *.

That the claim of the owners of the British steamship Foscolia, sunk by collision with the United States steamship Columbia on the evening of May twenty-eighth, eighteen hundred and ninety-eight, near Fire Island light-ship, for and on account of the loss of said vessel and cargo, may be submitted to the United States district court for the southern district of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and said court shall have jurisdiction to hear and determine and to render judgment thereupon: *Provided, however*, that the investigation of said claim shall be made upon the following basis: First, the said court shall find the facts attending the loss of the said Steamship Foscolia and her cargo; and, second, if it shall appear that the responsibility therefor rests with the United States Steamship Columbia, the court shall then ascertain and determine the amounts which

should be paid to the owners, respectively, of the Foscolia and her cargo, in order to reimburse them for the losses so sustained, and shall render a decree accordingly: *Provided further*, That the amounts of the losses sustained by the master, officers, and crew of the Foscolia may be included in such decree.

That should such decree be rendered in favor of the owners of the Foscolia and her cargo, the amount thereof may be paid out of any money in the Treasury not otherwise appropriated. (Act of May 27, 1902, c. 887, 32 Stat. 207, 242—construed in *Watts* v. *United States*, 129 Fed. 222.)

AN ACT For the relief of the owner of the steamer Mayflower

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owner of the steamer Mayflower rising out of a collision between said steamer and the United States submarine L–10 in President Roads, Boston Harbor, on the 11th day of August, 1917, for and on account of the losses alleged to have been suffered in said collision by the owner of said steamer Mayflower through damage to said steamer Mayflower, may be submitted to the United States Court for the District of Massachusetts, the district in which said collision occurred, under and in compliance with the rules of said court sitting as a court of admiralty: *Provided*, That the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due, either for or against the United States, upon the same principle and measure of lia-

bility with costs as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said Court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of May 15, 1922, c. 193, 42 Stat. 1590—construed in *Nantasket Beach S. B. Co.* v. *United States*, 297 Fed. 656.)

AN ACT For the relief of the owners of the steamship Ceylon Maru

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim Nippon Yusen Kabushiki Kaisha, owner of the Japanese steamship Ceylon Maru, against the United States of America, for damages alleged to have been caused by collision of Trompeloupe, France, on November 2, 1918, between the said vessel and the American steamship Jeanette Skinner, owned by the United States of America, and being then operated by the War Department in its transport service, may be sued for by the said Nippon Yusen Kabushiki Kaisha in the District Court of the United States for the Eastern District of New York, sitting as a court of admiralty and acting under the rules governing such court; and such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due

against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That in the suit authorized by this Act any and all of the testimony taken in the suit of Nippon Yusen Kabushiki [Kaisha] against the steamship Jeannette Skinner begun by the filing of a libel in the District Court of the United States for the District of Maryland on March 1, 1919, may be offered by or in behalf of the Government or the owner of the Ceylon Maru and shall be admissible in evidence: *And provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of February 16, 1925, c. 239, 43 Stat. 1264—construed in *Nippon Yusen Kabushiki Kaisha* v. *United States*.)

APPENDIX C

Unreported Opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*. (Eastern Dist., N. Y., May 7, 1926.)

CAMPBELL, *D. J.*:

[The opinion covers twenty-one typewritten pages. Only that part printed here deals with the matter of interest.]

But one question remains for further consideration and that is whether, as contended by the libellant, this court, under the special act which conferred jurisdiction upon it to try this case, has power to allow the libellant interest from the date of the collision up to the date of the decree.

If the allowance of interest rests in discretion in the case at bar, the reasons for the exercise of that discretion in libellant's favor are convincing.

The question of the allowance of interest in the case at bar, however, is primarily one of law.

No action could be maintained by the libellant in this court for the recovery of any of the damages alleged in the libel if the United States had not, by the statute cited, *supra*, permitted itself to be sued in this court as provided in that statute.

That statute must be strictly construed and this court cannot go beyond the letter of such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166, *Reid Wrecking Co.* v. *United States*, 202 Fed. 314, *Reid* v. *United States*, 211 U. S. 529, *United States* v. *Dalcour*, 203 U. S. 408, The Isonomia, 285 Fed. 515.)

It is a well settled principle that the United States is not liable to pay interest on claims against it in the absence of expressed statutory provision to that effect (*Angarica* v. *Bayard*, 127 U. S. 251), in which case Mr. Justice Blatchford, writing for the court, at page 260 said:

> "It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

As a further evidence of the existence of such rule, reference may be made to Section 177 of the Judicial Code which controls the action of the Court of Claims, and reads as follows:

> "SEC. 177. (NO INTEREST ON CLAIMS) No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It thus appears that Congress must have expressed its intention to allow interest on the libellant's claim up to the time of the rendition of the decree, or interest must be denied.

Interest is not specifically mentioned in the Enabling Act approved February 16, 1925, under which the suit at bar has been brought, but after describing the claim of the libellant, and conferring jurisdiction on this court sitting as a court of admiralty and acting under the rules governing such court, the said act, in part provides as follows:

> "And such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal."

If the suit at bar was between private parties the libellant would, without doubt, be allowed interest. (*The America*, 1 Fed. cases, 285, reversed on other grounds, 92 U. S. 432. *In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916).

The United States if it prevailed would be entitled to interest, but does it follow as a logical consequence that the converse of the proposition is true?

Libellant contend that it is, and cites *The Commonwealth*, 297 Fed. 651, 654, and *Texas Co. v. United States of America*, unreported opinion of Judge Goddard, District Court, Southern District of New York, Admiralty 81-332, January 29, 1926.

I am not convinced that by the use of the words upon the same "principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided.

Earlier in said Act the jurisdiction of this court is limited as follows:

> "To hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States."

A distinction between damages and interest exists (*The Scotland*, 118 U.S. 507) in which case, at page 518, Mr. Justice Bradley, writing for the court, says:

> "The allowance of interest on damages is not an absolute right."

Therefore, by the use of the words "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

I do not think it makes any difference whether or not the United States is claiming interest in the case at bar, as suggested in *Nantasket Beach*

Steamboat Co. v. *United States*, 297 Fed. 656, although if the reasoning of that opinion be accepted, it is exactly in point and justifies the denial of such interest in the case at bar; but my decision is based on the ground that this court is concluded by the Enabling Act, *supra*, and that under that Act this court is not empowered to allow such interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 551

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit having reference to the question of damages is reported in 19 F. (2d) 744 and appears at page 69 of the Record. The opinion of the District Court relating to damages is reported in 16 F. (2d) 643 and appears at page 50 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals denying the petition for rehearing was entered on June 28, 1927 (R. 89). The petition for certiorari was filed September 21, 1927. The jurisdiction of

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this Court to issue the writ is found in Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether in libel proceedings against the United States for collision losses in admiralty filed by authority of an Act of Congress conferring jurisdiction on the District Court to enter judgment for damages sustained upon the same principle and measure of liability as in like cases between private parties, interest upon the several items of damages, from the dates of the losses, is recoverable.

STATEMENT

By authority of a Special Act of Congress approved May 15, 1922 (c. 192, 42 Stat. 1590), the libel was filed by the owners of the steam lighter "Cornelia" against the United States, as owner of the destroyer "Bell," to recover damages arising out of collision between the vessels on August 9, 1918. Upon the question of liability, the Circuit Court of Appeals (7 F. (2d) 278), reversing the District Court (298 Fed. 768), which had found in favor of the Government, held both vessels at fault and divided the damages. On proceedings pursuant to the mandate, the District Court entered judgment for the petitioner for $45,542.34, one-half the amount of damages assessed, but without interest. (R. 49.) Appeals were taken by both parties to the United States Circuit Court of Ap-

peals for the First Circuit. That court dismissed the appeal by the owner of the "Cornelia," which asked interest on the damages at 6% from the date of the collision.

THE STATUTE

(C. 192, 42 Stat. 1509)

AN ACT FOR THE RELIEF OF THE OWNER OF THE STEAM LIGHTER "CORNELIA"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty be-

tween private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act.

ARGUMENT

The decision of the Circuit Court of Appeals follows the previously accepted decisions of the District Courts in *Watts* v. *United States* (S. D. N. Y. 1904), 129 Fed. 222; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75; *Nantasket Beach Steamboat Company* v. *United States* (D. C. Mass. 1924), 297 Fed. 656; *Whitelaw* v. *United States* (N. D. Calif. 1925), 9 F. (2d) 103; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y. 1926), 1926 A. M. C. 1008. It is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in the cases of *New York and Cuba Mail Steamship Company* v. *United States* (16 F. (2d) 945), and *The Texas Company* v. *United States* (16 F. (2d) 948), applications for certiorari in which cases were filed by the Government and denied by this Court (Nos. 1064, 1065, and 1055, October Term, 1926). The refusal to grant certiorari at the request of the United States does not seem to have set the question at rest.

It is important that the question now be settled by this Court. Approximately one hundred and forty libels filed by authority of Private Acts, demanding damages of $5,000,000, are pending in the District Courts. They relate to collision losses with public vessels which occurred during the war period, 1917–1919. One hundred and forty-two additional libels, asking $3,650,000, have been filed in the Bering Sea cases where the losses occurred during the years 1886–1896.

It is our belief that the decision of the Circuit Court of Appeals for the First Circuit disallowing interest is sound. However, in view of the conflict of decisions between the two Circuit Courts of Appeal, we consider that the review of the question by this Court is desirable, and concur in the petition for writ of certiorari.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General,
GEORGE R. FARNUM,
Assistant Attorney General,
J. FRANK STALEY,
Attorneys for the United States.

OCTOBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 15

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND THE DISTRICT COURT

BRIEF FOR THE UNITED STATES ON REARGUMENT[1]

OPINIONS OF THE COURTS BELOW

The opinions of the Circuit Court of Appeals dealing with the questions of interest (R. 47) are reported in 29 F. (2d) 744.

The opinions of the District Court dealing with the interest questions (R. 39) are reported in 26 F. (2d) 963.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 4, 1927 (R. 60); rehearing denied

[1] Up to the time that this is printed no new brief for petitioner has been received, hence the references herein to "petitioner's old brief."

June 28, 1927 (R. 60). The petition for certiorari was filed September 21, 1927, and granted November 21, 1927. (R. 61.) The jurisdiction of this Court rests on Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, in a proceeding against the United States in admiralty for collision losses, filed by authority of a private Act of Congress conferring jurisdiction upon the District Court to enter judgment for "legal damages * * * upon the same principle and measure of liability with costs as in like cases in admiralty between private parties," interest upon the several items of damages, from the dates of the losses, is recoverable.

THE STATUTE

An Act for the relief of the owner of the steam lighter *Cornelia*:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claim of the owner of the steam lighter *Cornelia* arising out of a collision between said steam lighter and the United States destroyer *Hull* in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter *Cornelia* by reason of damages to or the loss of said

steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. [c. 192, 42 Stat. pt. 2, 1520.]

STATEMENT OF THE CASE

This is a libel *in personam* in admiralty, filed in the District Court of the United States for the District of Massachusetts by the petitioner, as owner of the steam lighter *Cornelia*, against the United States, as owner of the destroyer *Bell*, to recover damages arising out of a collision between

the two vessels in the channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918. (R. 8.) The authority for the proceeding is a private Act of Congress approved May 15, 1922, c. 192, 42 Stat. 1590.

The *Cornelia* was beached on the side of the channel and sank in the shallow water. (R. 8 et seq.) The *Bell* sustained minor damage in the collision (R. 5) but no cross libel therefor was filed.

The District Court found the *Cornelia* solely at fault (298 Fed. 768) and dismissed the libel; but, upon appeal, it was held that both vessels were at fault and that the damages should be divided. (R. 6.) On further proceedings, pursuant to the mandate, the District Court entered judgment for the petitioner in the sum of $45,542.34, one-half the damages, without interest. (R. 38.) The case again went to the Circuit Court of Appeals, which approved the holding of the District Court that interest should not be allowed.

SUMMARY OF THE ARGUMENT

(1) It has always been the policy and practice of the Government to deny interest on claims arising out of collisions with public vessels, as indicated by a chronological outline herein, showing development of this policy from the beginning, although in four known instances, upon consideration of the merits, Congress has authorized the recovery of "damages, *including interest* * * *."

(II) In 1901, after thirty years' handling of these cases by the Court of Claims, Congress initiated the practice of referring them to the District Courts, and, in connection with the very first statute, expressly declined to allow interest and made it quite clear that it did not understand or intend the phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," to include interest.

Since that time more than a hundred statutes have been enacted in the same language, and Congress has repeatedly manifested its understanding that the words used did not contemplate allowance of interest.

The District Courts have interpreted these statutes in many cases (fifty-two cited in the brief) as excluding interest, and their decrees, certified to Congress from time to time, have been paid as entered, without interest being added and without suggestion by Congress (either when appropriating money to pay the decree or, later, when enacting other statutes in the same language) that its oft-repeated phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," had been misconstrued. And the interpretation thus adopted by the courts, and approved and acquiesced in by Congress, became a part of the law.

The correctness of the conclusion reached in the District Courts was never seriously questioned prior to the decision of the Circuit Court of Appeals, Second Circuit, in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, on January 10, 1927—*after* enactment of the present statute.

(III) If we ignore the construction placed upon these statutes as a whole and test the isolated words and phrases thereof by general principles, as petitioner has done, even then they do not contain language sufficient to include interest. There is a distinction, well known in admiralty, between "damages" and "interest," allowance of which (between private parties) is a matter of discretion and dependent upon the circumstances of each case. Thus, it may be denied because of delay in bringing the action—but the rules governing its allowance or disallowance are based upon the theory of legal liability existing from the time of the accident, and seem impossible of application in cases against the Government.

Interest is usually awarded in admiralty between private parties, but it is awarded as interest and by that name, as indicated by excerpts herein from decrees of admiralty courts.

ARGUMENT

I

It Has Always Been the Policy and Practice of the Government, Declared by Congress, Recognized and Applied by the Executive Departments and the Courts, not to Allow Interest in Collision Cases

(a) THE GENERAL PRINCIPLE

That interest may not be awarded against the United States unless Congress shall expressly authorize it is, of course, elementary. That such authority is not usually given is common knowledge. *Angarica* v. *Bayard*, 127 U. S. 251, 260, states the general rule:

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application.

And see *United States* v. *North American Co.*, 253 U. S. 330, 336; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304.

(b) CHRONOLOGICAL OUTLINE OF DEVELOPMENT OF THIS POLICY IN COLLISION CASES

From the beginning of the Government until the year 1846 we find no instance of congressional recognition of a claim arising out of a collision with

a public vessel. Perhaps this may be accounted for by the view long prevailing in our early history, and thus stated by the Solicitor for the United States in *Dennis* v. *United States*, 2 Ct. Cls. 210:

> It is undoubtedly true that the claimant could not have proceeded against the vessel, but he might have proceeded against the master. Here it is alleged that the collision resulted from the failure of the government ship to have the required signals. The failure to do this must be regarded as negligence on the part of the master. For such negligence the master, and not the United States, is responsible, and for this the claimant, by the statutes to which reference has been made, has a complete remedy in the district courts.

(The court held that it had no jurisdiction, though the claimant attempted to waive the tort and sue in contract.)

Private Acts

1846–1871. During this period several private Acts appropriated specific sums, without referring the matter to any court, for damages sustained by private vessels in collision with those of the United States. See Act of August 8, 1846, c. 151, 9 Stat. 670 (the first instance found of such recognition by Congress of responsibility), appropriating $800 "for expenses incurred * * * for repairs;" Act of February 18, 1859, c. 37, 11 Stat. 560, appropriating $2,000 "in full compensation for the damages sus-

tained;" Act of December 15, 1862, c. 2, 12 Stat. 913, appropriating $9,500 "as full compensation * * * for damages received"—all without interest.

(The practice thus initiated has never been entirely abandoned. As late as March 3, 1927, c. 447, 44 Stat. 1833, Congress appropriated a specific sum of money as "the total cost of repairing the damages" resulting from a collision with a public vessel—and this sum did not include interest. House Rept. 1804, 69th Cong. 2d Sess.)

1871–1900. By joint resolution of March 3, 1871, 16 Stat. 705, the Court of Claims was authorized to take jurisdiction of a claim arising out of a collision between the schooner *William Carlton* and the U. S. Ram *Stonewall*, and for forty years thereafter Congress continued to refer such cases to the Court of Claims. Acts of June 22, 1874, c. 418, 18 Stat. 201; January 12, 1877, c. 20, 19 Stat. 503; March 3, 1879, c. 197, 20 Stat. 483; August 3, 1894, c. 191, 28 Stat. 219; January 9, 1897, c. 8, 29 Stat. 483; May 26, 1900, c. 593, 31 Stat. 1572; February 26, 1907, c. 1666, 34 Stat. pt. 2, 2567, etc. etc. The Court of Claims was expressly forbidden by statute to allow interest on any claim prior to entry of judgment (R. S. Sec. 1091; U. S. C. Title 28, Sec. 284); and, in fact, did not award any interest, either before or after judgment. *Carlton* v. *United States*, 10 Ct. Cls. 485; *Prescott* v. *United States*, 19 Ct. Cls. 684; *St. Louis, etc., Co.* v. *United States*, 33 Ct. Cls. 251.

1901–1928. For several years Congress continued to refer some collision cases to the Court of Claims. Principally, however, they have been referred to the District Courts. *Over a hundred private Acts,* beginning with that of March 2, 1901, c. 824, 31 Stat. 1789, have provided for the recovery in such courts of "*damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties*"—a few (mostly earlier ones) did not employ this formula. *Final decrees in more than fifty cases, entered without interest,* have been certified to Congress and paid.

In *New York & Cuba Mail S. S. Co.* v. *United States* (January 10, 1927), 16 F. (2d) 945, and a few cases in the same circuit following it, interest has been awarded—but no decree thus awarding interest from date of the collision has yet reached Congress for payment.

General Statutes

The Act of June 24, 1910, c. 378, 36 Stat. 605, 607 (amended by the Act of December 28, 1922, c. 16, 42 Stat. 1066; U. S. C. Title 34, Sec. 599), *authorized the Secretary of the Navy to "adjust and determine the amounts due" on small claims* arising out of collisions with public vessels, and later statutes (see Appendix) have conferred similar authority upon the heads of other Departments. Letters addressed to the Attorney General by the heads of those departments (see references in Appendix) show that

their usual practice of disallowing interest, recognized by this Court in *Angarica* v. *Bayard, supra,* has not been departed from when adjusting such claims. The awards in all cases are reported to Congress, as required by law. Act of July 7, 1884, c. 334, 23 Stat. 236, 254 (U. S. C. Title 5, Sec. 266); and provisos in the above-mentioned statutes.

The Act of March 3, 1925, c. 428, 43 Stat. 1112 (U. S. C. Title 46, Secs. 781, 782), *authorized libels in personam for damages caused by public vessels after April 6, 1920.* The Senate Committee on Claims, when reporting the bill (Sen. Rep. 941, p. 1, 68th Cong. 2d Sess.), thus stated its purpose:

> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which private owners have been allowed to submit to our admiralty courts admiralty claims of this character.

The Attorney General, writing the Chairman of the Committee, on April 8, 1924 (Sen. Rep. 941, p. 12, 68th Cong. 2d Sess.), made the following observations:

> Section 2 of the proposed bill provides that actions brought by authority of the bill shall be subject to and proceed according to the Suits in Admiralty Act. The Act allows interest in the discretion of the court from the time the cause of action arises. As applied by the proposed bill, interest would run in collision, salvage, and con-

> tract cases from the time the cause of action arose. Relief now granted against the Government in contract matters in the Court of Claims and district courts under the Tucker Act deny interest and allow it only upon the judgment or decree entered. *In the special Acts heretofore passed granting relief in collision matters the right to recover interest has generally been denied.* Allowance of interest from the time the cause of action arises in contract matters appears to have more merit than the allowance of interest in tort matters. The policy of the Government should be to allow interest in both classes of actions or to deny interest in both classes of cases. However, as I have stated, this is a legislative matter rather than a question for me to review. [Italics supplied.]

The bill was amended so as to provide, in language long contained in the Court of Claims Act, *supra*, that—

> No interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

The Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C. Title 46, Secs. 742, 743), to which the Attorney General referred, forbids the arrest of merchant vessels of the Emergency Fleet Corporation; but authorizes libels *in personam*, in respect of claims against such vessels, to proceed "according to the principles of law and to the rules

of practice obtaining in like cases between private parties," *with interest* on the damages, limited, however, to four per centum and to "run as ordered by the court."

(c) PETITIONER CONCEDES THE RULE BUT RELIES UPON A SO-CALLED EXCEPTION—HERE ANALYZED

Petitioner contends that this case comes not within the general rule stated in *Augarica* v. *Bayard, supra*, and so consistently followed in collision cases, but within the so-called exception—

> where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages—

and refers to an opinion of Attorney General Cushing, September 20, 1855, 7 Op. A. G. 523, 524–526, 531, for an elaboration thereof.

Mr. Cushing declared (p. 526):

> To the general rule thus laid down, there may possibly be, as Mr. Legare suggests, "some rare and singular exceptions." I confess myself at a loss, however, to say what they are, or, at any rate, to derive a rule from such exceptions.

However, as an "apparent, but not real, exception, if the case exists," he suggests that a statute may authorize recovery of "damages" where "a statute-interest on the detention of money is the established rendering of the term," and illustrates the proposition by a reference to 1 Stat. 85,—the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 85, Section 23 of which provided that a writ of error

should be a *supersedeas* and that, upon affirmance, the court should "adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

But that would be quite a different case.

(d) CONGRESS HAS IN REMOTE INSTANCES AUTHORIZED ALLOWANCE OF INTEREST IN COLLISION CASES, BUT WHEN SO DOING HAS EVIDENCED ITS INTENTION IN UNMISTAKABLE LANGUAGE

The Act of March 3, 1927, c. 408, 44 Stat. 1809, authorized the recovery of "damages, *including interest*, * * * upon the same principles and measures of liability as in like cases in admiralty between private parties." A delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility. Sen. Rep. 1658, 69th Cong., 2d Sess.

Three other statutes have provided for interest in the same manner. Acts June 3, 1924, c. 285, 43 Stat. 1369; June 7, 1924, c. 380, *id.* 1374; March 3, 1925, c. 504, *id.* 1389.

II

THE LANGUAGE USED IN THIS AND MANY SIMILAR ACTS HAS RECEIVED A SETTLED CONSTRUCTION BY THE COURTS, BY THE EXECUTIVE DEPARTMENTS AND BY CONGRESS, AS EXCLUDING INTEREST

(a) ORIGIN OF THE LANGUAGE AND ITS INTERPRETATION BY FIRST CONGRESS TO EMPLOY IT. SUBSEQUENT USE IN MANY PRIVATE ACTS

On March 14, 1900, after thirty years' handling of these collision cases by the Court of Claims, the

Senate Committee on Claims reported to the Senate, in connection with the claim of the Brooklyn Ferry Company for damages arising out of a collision between the Ferry Boat New York and the United States Steamer *Dolphin* (Sen. Rep. 681, 56th Cong., 1st Sess.):

> It is contended that these matters are the proper subjects of investigation by a court of the United States sitting in admiralty, and as the principal office of the ferry company is in the eastern district of New York, and the collision happened therein, that the United States district court for that district is the proper forum for the investigation of the questions involved, and that therefore jurisdiction should be conferred upon such court, with authority to render such judgment as will secure the payment by the United States of the damages, if any, that may be found to be due to the ferry company, with costs and interest. (Italics supplied.)

The bill accompanying the report provided:

> That a claim against the United States of the Brooklyn Ferry Company, of New York, * * * owner of the ferryboat New York, for damages caused by collision between the said ferryboat and the United States Steamer *Dolphin*, * * * may be sued for by the said ferry company, in the United States district court for the eastern district of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction

> to hear and determine such a suit and to enter a judgment or decree for the amount of such *damages*, if any shall be found to be due, against the United States in favor of the said ferry company, *upon the same principles and measure of liability, with costs and interest as in like cases in admiralty between private parties*, and with the same rights of appeal. [Italics supplied.]

The House Committee on Claims, reporting a similar bill on March 20, 1900, recommended elimination of the provisions for interest. House Rep. 721, 56th Cong. 1st Sess.

The Senate bill, meanwhile having been amended by striking out the words, "with costs and interest," was later substituted for the House bill (House Rept. 1629, 56th Cong. 1st Sess.), and, thus amended, became law. Act March 2, 1901, c. 824, 31 Stat. 1789; and see discussion in *Watts* v. *United States*, 129 Fed. 222, 226.

More than one hundred private Acts, since that time, have authorized the recovery of "damages * * * upon the same principle [or principles] and measure [or measures] of liability as in like cases in admiralty between private parties"—the language of the first Act, the language of the present one. (Petitioner has counted ninety-six, during fifteen years, "comparable in phraseology to that here in question"—old brief pp. 16-17.) More than two hundred cases under such statutes are now pending in the courts.

As heretofore pointed out, Congress has in four instances added the words, "including interest."

Several statutes, enacted after the decision in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, allowing interest, have expressly provided that "no interest shall be allowed"—an amendment hastily added to all such bills then pending before Congress. February 24, 1927, c. 191, 44 Stat. 1789, etc.; Cong. Rec., v. 68, pt. 4, pp. 3988, 3995, February 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2001, 2003; Sen. Repts. 1682, 1683—all 69th Cong., 2d Sess.

(3) FOR TWENTY FIVE YEARS THE DISTRICT COURTS UNIFORMLY INTERPRETED THESE STATUTES AS EXCLUDING INTEREST, AND CONGRESS APPROPRIATED MONEY TO PAY EACH DECREE AS ENTERED, WITHOUT ADDING INTEREST AND WITHOUT SUGGESTION OF DISAPPROVAL.

The Secretary of the Treasury, on February 11, 1927, wrote the Attorney General as follows:

> In compliance with your request, there has been prepared by this Department, and is enclosed herein, a statement exhibiting the judgments rendered by United States District Courts under Special (Private) Acts of Congress which have been certified to Congress, appropriations provided and payments effected during the twenty-year period covering the calendar years 1906 to 1926, inclusive.
>
> It will be noted that the only case where interest was appropriated and paid was in connection with the judgment rendered in the United States District Court for the North-

ern District of California in favor of the King Coal Company, as shown on page 2 of the statement. [In this case interest *from date of the decree* was paid, apparently through inadvertence, as pointed out below.]

The statement has since been brought up to date, and we have added three early cases. All of them appear below, arranged according to judicial districts—a total of forty-eight (48) collision cases, under special Acts, in which decrees have been entered without interest, certified to Congress, appropriations made without interest being added, and payments finally effected, without, so far as our research has disclosed, a single suggestion from Congress (either when appropriating money to pay the decree entered or, later, when enacting other statutes in the same words) that its language had been misconstrued.

(No case is here included except where a final decree has been entered and *paid* without interest, although four (4) others in which District Courts denied interest are mentioned elsewhere in the brief.)

Forty-three (43) were adjudicated under statutes providing for "damages * * * upon the same principle [or principles] and measure [or measures] of liability as in like cases in admiralty between private parties," two (2) under statutes which vary the phrase but slightly, and three (3) under statutes not employing the usual formula but calling for application of the same principles.

In connection with each there is given: (1) the year of the decree; (2) the citation, if reported; (3) reference to the congressional document showing certification of the decree to Congress for payment (except in three early cases, where no such document has been found); and (4) citation to the jurisdictional statute.

Eastern District of New York

Brooklyn Ferry Co. v. *United States* (1903), 122 Fed. 696 (Act Mar. 2, 1901, c. 824, 31 Stat. 1789); *Merritt & Chapman, etc., Co.* v. *United States* (1921), H. Doc. 358, 67th Cong., 2d Sess. (Act May 6, 1920, c. 169, 41 Stat. 1469); *John E. Moore Co.* v. *United States* (1923), H. Doc. 145, 68th Cong., 1st Sess. (Act March 3, 1921, c. 144, 41 Stat. 1553); *Merritt & Chapman, etc., Co.* v. *United States* (1923), H. Doc. 145, 68th Cong., 1st Sess. (Act April 28, 1922, c. 163, 42 Stat. 1587); *Erie R. R. Co.* v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act June 3, 1924, c. 247, 43 Stat. 1370); *Pendleton Bros. et al.* v. *United States* (1926), H. Doc. 332, 69th Cong., 1st Sess. (Act Mar. 3, 1923, c. 243, 42 Stat. 1792); *Nippon Yusen Kabushiki Kaisha* v. *United States* (1926), 1926 A. M. C. 1008, S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 239, 43 Stat. 1564).

Southern District of New York

Watts v. *United States* (1904), 129 Fed. 222, 226 (Act May 27, 1902, c. 887, 32 Stat. 207, 242); *United States* v. *New England Steamship Co.*,

"The Commonwealth" (1924), 297 Fed. 651, H. Doc. 632, 68th Cong., 2d Sess. (Act Feb. 20, 1914, c. 25, 38 Stat. 1244); *Clyde S. S. Co.* v. *United States* (1924), H. Doc. 632, 68th Cong., 2d Sess. (Act Feb. 26, 1923, c. 133, 42 Stat. 1774); *Aktieselskabet Marie di Giorgio* v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act Jan. 28, 1925, c. 107, 43 Stat. 1547); *Pan American, etc., Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Sept. 18, 1922, c. 333, 42 Stat. 1602); *Raritan Copper Works* v. *United States* (1926), H. Doc. 721, 69th Cong., 2d Sess. (Act Feb. 16, 1925, c. 237, 43 Stat. 1563); *Bruusgaard Kiosteruds Dampskibs Aktieselskab* v. *United States* (1927), H. Doc. 721, 69th Cong., 2d Sess. (Act June 7, 1924, c. 384, 43 Stat. 1376); *Eastman* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act May 7, 1926, c. 268, 44 Stat. 1469).

Eastern District of Virginia

Cobridge S. S. Co. v. *United States* (1912), H. Doc. 1373, 62 Cong., 3d Sess. (Act March 4, 1909, c. 334, 35 Stat. 1622); *Arundel Sand & Gravel Co.* v. *United States* (1921), S. Doc. 32, 67th Cong., 1st Sess. (Act Dec. 31, 1919, c. 36, 41 Stat. 1457); *Eastern Transpt. Co.* v. *United States* (1921), S. Doc. 31, 67th Cong., 1st Sess. (Act March 30, 1920, c. 114, 41 Stat. 1461); *Warren Transpt. Co.* v. *United States* (1921), H. Doc. 358, 67th Cong., 2d Sess. (Act June 5, 1920, c. 283, 41 Stat. 1521, 1639); *New England Coal & Coke Co. et al.* v. *United States*

(1922), S. Doc. 258, 67th Cong., 2d Sess. (Act April 26, 1916, c. 87, 39 Stat. 1261); ***Fortunato*** v. *United States* (1922), H. Doc. 527, 67th Cong., 4th Sess. (Act Feb. 18, 1922, c. 62, 42 Stat. 1578); *Th. Brovig* v. *United States* (1924), H. Doc. 302, 68th Cong., 1st Sess. (Act Feb. 26, 1923, c. 136, 42 Stat. 1776); *Lloyd Mediterraneo Societa Italiana di Navigazione* v. *United States* (1924), H. Doc. 534, 68th Cong., 2d Sess. (Act Feb. 26, 1923, c. 137, 42 Stat. 1777); *Fred E. Jones Dredging Co.* v. *United States* (1924), H. Doc. 534, 68th Cong., 2d Sess. (Act March 2, 1923, c. 206, 42 Stat. 1787); *Picton S. S. Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Feb. 7, 1925, c. 160, 43 Stat. 1555); *Beaufort County Lumber Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 247, 43 Stat. 1568); *Ferlita* v. *United States* (1926), S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 28, 1925, c. 380, 43 Stat. 1581).

District of Massachusetts

Meyers v. *United States* (1918), S. Doc. 429, 65th Cong., 3d Sess. (Act Aug. 21, 1916, c. 391, 39 Stat. 1393); *Deering* v. *United States* (1922), 281 Fed. 281, H. Doc. 358, 67th Cong., 2d Sess. (Act June 5, 1920, c. 284, 41 Stat. 1521, 1639); *Thurlow* v. *United States* (1924), 295 Fed. 905, H. Doc. 534, 68th Cong., 2d Sess. (Act May 15, 1922, c. 191, 42 Stat. 1589); *Nantasket Beach S. B. Co.* v. *United States* (1924), 297 Fed. 656, H. Doc. 534, 68th Cong. 2d Sess. (Act May 15, 1922, c. 192, 42 Stat. 1590);

Staples Transpt. Co. v. *United States* (1925), H. Doc. 169, 69th Cong. 1st Sess. (Act Feb. 16, 1925, c. 244, 43 Stat. 1567).

Northern District of California

King Coal Co. v. *United States* (1924), H. Doc. 169, 69th Cong., 1st Sess. (Act April 16, 1920, c. 148, 41 Stat. 1467); *Alaska Commercial Co.* v. *United States* (1925), 1925 A. M. C. 1269, H. Doc. 329, 69th Cong., 1st Sess. (Act April 12, 1924, c. 100, 43 Stat. 1361); *Charles Nelson Co.* v. *United States* (1926), S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 251, 43 Stat. 1571); *Rolph Navigation, etc., Co.* v. *United States* (1927), H. Doc. 721, 69th Cong., 2d Sess. (Act Nov. 17, 1921, c. 126, 42 Stat. 1568).

Eastern District of Louisiana

Tropical Fruit S. S. Co. v. *United States* (1918), H. Doc. 1701, 65th Cong., 3d Sess. (Act Feb. 14, 1917, c. 65, 39 Stat. 1474); *Peters* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act Feb. 21, 1923, c. 104, 42 Stat. 1771); *Kokusai Kisen Kabushiki Kaisha* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act Feb. 25, 1925, c. 332, 43 Stat. 1576).

District of Maryland

Eastern Transpt. Co. v. *United States* (1917), 253 Fed. 42, H. Doc. 1179, 65th Cong., 2d sess. (Act Aug. 9, 1916, c. 312, 39 Stat. 1353); *Baltimore Dry-*

docks, etc., Co. v. *United States* (1921), S. Doc. 62, 67th Cong., 1st Sess. (Act Dec. 26, 1920, c. 5, 41 Stat. 1523).

Southern District of Florida

Emile et al. v. *United States* (1926), H. Doc. 621, 69th Cong., 2d Sess. (Act Aug. 24, 1921, c. 98, 42 Stat. 1567).

Eastern District of Pennsylvania

Lehigh Coal, etc., Co. v. *United States* (1928), H. Doc. 281, 70th Cong., 1st Sess. (Act Feb. 14, 1927, c. 151, 44 Stat. 1773).

District of Maine

Pennell v. *United States* (1908), 162 Fed. 75, 76 *et seq.* (Act Feb. 24, 1905, c. 777, 33 Stat. 743, 810).

District of New Jersey

Alexanderson v. *United States* (1922), S. Doc. 258, 67th Cong., 2d Sess. (Act March 3, 1921, c. 145, 41 Stat. 1353).

District of Rhode Island

Miller v. *United States* (1924), 289 Fed. 816, H. Doc. 534, 68th Cong., 2d Sess. (Act February 18, 1922, c. 61, 42 Stat. 1578).

Eastern District of South Carolina

Dampskibesselskabet Dannebrog v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act Aug. 9, 1921, c. 59, 42 Stat. 1565).

Eastern District of Michigan

Great Lakes Engineering Works (Russell, Receiver) v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Jan. 28, 1925, c. 105, 43 Stat. 1547).

In eight instances, through inadvertence or otherwise, the decree originally contained the words "with interest." *Tropical Fruit S. S. Co.* v. *United States; New England Coal & Coke Co. et al.* v. *United States; Merritt & Chapman, etc., Co.* v. *United States* (1921); *Merritt & Chapman, etc., Co.* v. *United States* (1923); *John E. Moore Co.* v. *United States; Alaska Commercial Co.* v. *United States; Charles Nelson Co.* v. *United States; King Coal Co.* v. *United States.* In each case, however, the matter was rectified, usually with consent of counsel for the libellant. The following communication, addressed to Government counsel by Judge Kerrigan, May 18, 1925, indicates how the decree in *Alaska Commercial Co.* v. *United States* happened at first to contain the words "with interest":

> In preparing my memorandum opinion in the case of *Alaska Commercial Co.* v. *United States of America*, I inadvertently overlooked the fact that interest was under the terms of the statute in question not allowed. Hence, I have stricken from the face of the opinion as filed the word "interest."

A certified copy of the final decree shows that interest was not allowed.

In *King Coal Co.* v. *United States* a similar correction was made. The matter then went to the Circuit Court of Appeals on other issues, and judgment against the United States was affirmed. The opinion of the appellate court did not mention interest; the final decree, however, awarded interest *from the date thereof*, without objection being raised, and in this shape was certified to Congress and paid. The matter can be accounted for now only on the ground of inadvertence.

In *United States* v. *New England S. S. Co.* ("*The Commonwealth*"), interest was at first awarded, but a consent decree finally entered did not allow it.

We know of no instance since the beginning of the Government in which interest prior to date of the decree has been *paid* by the United States in a collision case, save the three following, where Congress, upon consideration of the merits, expressly authorized a recovery of "damages *including interest*, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties." *Colonial Navigation Co.* v. *United States* (E. D. N. Y., 1927), H. Doc. 281, 70th Cong., 1st Sess. (Act June 3, 1924, c. 245, 43 Stat. 1369); *Donaldson* v. *United States* (E. D. Pa., 1927), H. Doc. 281, 70th Cong., 1st Sess. (Act March 3, 1927, c. 468, 44 Stat. 1839); *Mallory S. S. Co.* v. *United States* (E. D. N. Y., 1927), H. Doc. 76, 70th Cong., 1st Sess. (Act March 3, 1925, c. 504, 43 Stat. 1589).

There is no room for doubt that Congress knew how its oft-repeated phrase, "damages * * *

upon the same principle and measure of liability as in like cases in admiralty between private parties," was being interpreted. In connection with each decree certified it was distinctly pointed out that interest was not included—

> "nor is the payment of interest provided for in the jurisdictional Act."

The quoted words, taken from the President's letter of August 12, 1921, transmitting the decree in *Baltimore Dry Docks, etc., Co.* v. *United States* (S. Doc. 62, 67th Cong., 1st Sess.), commonly appear.

Very few of the cases discuss the question of allowance of interest; in very few, indeed, has it been an issue. Congress seemed to have made it very clear when enacting the first of these statutes that it did not understand, or intend, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties" to include interest; the courts early found and gave effect to the intent so manifested; and the result accorded with the practice prevailing when collision cases were adjusted by Committees of Congress, by the Executive Departments, or in the Court of Claims. There seemed hardly room for controversy. Authors and compilers accepted the principle without question. Benedict on Admiralty (5th ed.), Sec. 419; Sutherland on Damages (4th ed.), Sec. 1294 (vol. 5, p. 5013); 1 Corpus Juris, 1363, etc.

Written opinions, denying interest, do discuss the principles in the following cases: *Watts* v. *United States* (S. D. N. Y., 1904), 129 Fed. 222, 226; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75, 76, et seq.; *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass., 1924), 297 Fed. 656; *Whitelaw* v. *United States* (N. D. Calif., 1925), 9 F. (2d) 103, 104; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y., 1926), 1926 A. M. C. 1008 (see appendix); *Long Island R. R. Co.* v. *United States* (E. D. N. Y., 1926), 1926 A. M. C. 1011 (excerpt *infra* p. 33; *Commonwealth & Dominion Line Ltd.* v. *United States* (E. D. N. Y., 1926—short opinion, denying interest, not reported), reversed in part in 20 F. (2d) 729, now pending in this Court on writ of certiorari; *Alaska Commercial Co.* v. *United States* (N. D. Calif., 1925—explanation of Judge Kerrigan, *supra*); and also, of course, the opinions below in this case.

Whitelaw v. *United States* (not a collision case) is one of a hundred and nineteen (119) cases denying interest under the Act conferring jurisdiction to award damages for wrongful seizure, etc., of Behring Sea fishing vessels. It is cited here because, when denying, in that one case alone, thirty-five years' interest claimed on nearly a hundred thousand dollars, the court discussed the principles involved and the long practice of admiralty courts in collision cases brought under special Acts.

Watts v. *United States* (although preceded by *Brooklyn Ferry Co.* v. *United States*) was the first

special Act case to discuss the question of interest in a published opinion. Considering the prior practice and the apparent intention of Congress not to depart therefrom when referring these matters to the District Courts, instead of to the Court of Claims (as evidenced by the legislative history of the Acts) the court reached the following conclusion (129 Fed. p. 227):

> The claimants here, while conceding that if the matter had been referred by Congress to the Court of Claims, [as had been the practice for many years], interest would not be recoverable, urge that as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that under the authorities cited, interest is not allowable, unless expressly provided for, and there being a complete absence of any allusion to interest in the Act, under which the action has been tried here, it should not be granted.

The late, and seemingly well-considered (although unreported), opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States* declared:

> I am not convinced that by the use of the words "upon the same principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided * * *

A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507), in which case, at page 518, Mr. Justice Bradley, writing for the Court, says: "The allowance of interest on damages is not an absolute right."

Therefore, by the use of the words, "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this Court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this Court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Tucking Act, supra, conferred upon this Court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

We seek, of course, the intention of Congress. Consider, then, that for nearly twenty-five years, the District Courts interpreted these private Acts as excluding interest (according thereby with the policy of the Government from the beginning and with the practice of the Court of Claims, Committees of Congress and the Executive Departments when adjusting collision claims), that their decrees so entered were certified to Congress, which appropriated the money called for, without adding interest and without suggestion that its language had been misconstrued, and then continued throughout

that period to use the same language in a hundred statutes. How can this be reconciled on any other hypothesis than that Congress intended to deny interest, as it always had done, and approved and adopted the construction placed upon its language by the courts? *Case of the Sewing Machine Companies*, 18 Wall. 553, 594; *United States v. Morrison*, 262 U. S. 328, 332, and cases there cited.

>>> THE SUBSTITUTION OF CONGRESS FOR COURTS IS A CLEAR INDICATION THAT THESE WORDS WERE MEANT NOT AS CONDEMNATION BUT AS DESCRIBING THE POWER OF CONGRESS

It will be recalled that the bill in the *Brooklyn Bridge* case (the first) provided for—

> damages * * * upon the same principles and measure of liability with rules and interest, as in like cases in admiralty between private parties—

but that Congress, declining to depart from the time-honored practice theretofore prevailing, refused to authorize allowance of interest and by amendment struck out the words underscored. From this it is apparent that the author of the phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," had no idea that, standing alone, it included interest; nor did Congress. *Miller v. United States*, House Rep. 725, 38th Cong., 1st Sess., both supra.

[illegible] such instances of unsuccessful effort to add, "including interest," are collected on the following pages.

Sen. Rep. 636; Cong. Rec., vol. 53, pt. 10, p. 9532, 64th Cong., 1st Sess. (Act August 9, 1916, c. 312, 39 Stat. 1353). The bill read "damages, interest, and costs." The Secretary of the Navy reported—

> It has been the general practice of the Congress in bills of this character not to allow interest against the United States. It is accordingly suggested that the word "interest" * * * be stricken out.

This was done by amendment.

House Rep. 620; Cong. Rec., vol. 53, pt. 10, p. 9418, 64th Cong., 1st sess. (Act August 21, 1916, c. 391, 39 Stat. 1261). Attorney for the claimant urgently insisted, because of the circumstances "that if ever there was a case in which interest should be allowed this is such a case," and that recovery should be authorized—

> not only for the damage, but for the interest on the damage.

The Secretary of the Navy recommended passage of the bill, worded "including interest." On recommendation of the Committee, however, Congress eliminated those words by amendment.

Cong. Rec., vol. 66, pt. 4, pgs. 3459, 3537, 68th Cong., 2d Sess. (Act February 16, 1925, c. 239, 43 Stat. 956). The bill, worded "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. Note the following explanation in the Senate of the House amendment:

> *Mr. Underwood.* Mr. President, there are three bills from the House of the same nature on the desk, with the same amendment, which reduces the amount the claimant is to receive. I ask that they may receive immediate consideration. • • • As the bills passed the Senate they allowed interest. The House strikes out the allowance of interest and reduces the amount.

Cong. Rec., vol. 67, pt. 4, pp. 4058–4060, 69th Cong., 1st Sess. (Acts May 1, 1926, c. 213, 44 Stat. 1464 and May 7, 1926, c. 270, 44 Stat. 1470). These two bills and several others not here listed, had contained the words, "including interest," just eliminated by amendment; whereupon the following colloquy took place.

> *Mr. King.* Do I understand that the interest provision has been striken out of the bills which have just been passed, so that the judgments shall not bear interest?
>
> *Mr. Copeland* [who had reported the measures]. Yes. The words "including interest" were stricken out of the bills.

And in several other instances effort has been made, while the bill was pending before Congress, to have allowance of interest authorized. Thus, the Acts of May 6, 1920, c. 169, 41 Stat. 1469; May 19, 1924, c. 159, 43 Stat. 1364; Feb. 16, 1925, c. 237, 43 Stat. 1263; Feb. 16, 1925, c. 238, 43 Stat. 1264; Feb. 16, 1925, c. 251, 43 Stat. 1271, as originally introduced, contained the words, "including interest." In one instance the bill so worded passed the Senate,

but the House insisted upon their elimination. In each instance the bill, before passage, was amended so as to eliminate the words, "including interest." Cong. Rec., vol. 65, pt. 5, p. 4686, 68th Cong., 1st Sess.; vol. 66, pt. 4, pp. 3458, 3463, 3491, 68th Cong., 2d Sess.

On the other hand, in four instances, as heretofore pointed out, effort to add the words, "including interest," was successful. In one instance the Senate passed a bill containing them; the House, feeling that interest should not be allowed, eliminated them by amendment; but the Senate declined to concur in the amendment and, finally, the House yielded. Cong. Rec., vol. 66, pt. 5, p. 4834, 68th Cong., 2d Sess. (Act March 3, 1925, c. 504, 43 Stat. 1589). In such cases the statute provided for—

> damages, *including interest*, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties.

Was insertion of the words, "including interest," mere tautology? Have these deliberations been utterly meaningless? The courts have not thought so. Note the following paragraph from Judge Campbell's opinion in *Long Island R. R. Co. v. United States* (E. D. N. Y., 1926—not reported, but summarized in 1926 A. M. C., p. 1011):

> A further reason for denying interest may be found, if a further reason be necessary, because it appears that the bill in the suit at bar, as reported to Congress, included

a provision for interest, and that the bill was amended in the House of Representatives by striking out the words "including interest" after the word "damages."

(d) THE RECENT CASES IN THE SECOND CIRCUIT ALLOWING INTEREST ARE NOT WELL CONSIDERED, AND REPRESENT CONSPICUOUS DEPARTURES FROM THE ACCEPTED VIEW

Of the cases referred to by petitioner (old brief, pp. 20-22), as allowing interest, *The Friedrich der Grosse*, 1926 A. M. C. 361, and *Texas Co.* v. *United States*, 11 F. (2d) 981, affirmed in 16 F. (2d) 948, are the same case reported under different names. The opinion in *Alaska Commercial Co.* v. *United States*, 1925 A. M. C. 1269, did originally contain the words, "with interest and costs," but as hereinbefore pointed out (p. 24) this was an error promptly corrected by the judge himself.

This leaves for us to consider, only *The Commonwealth*, 297 Fed. 651; *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945; *Texas Co.* v. *United States;* and *Commonwealth & Dominion Line, Ltd.*, v. *United States*, 20 F. (2d) 729 (now pending in this Court on writ of certiorari)—all in the Second Circuit. The two last mentioned followed *New York & Cuba Mail S. S. Co.* v. *United States*, in the Circuit Court of Appeals, without further discussion.

Pursuant to statutory direction, the United States libeled the Steamship *Commonwealth* to recover damages resulting from a collision between that vessel and the battleship *New Hampshire*. By

authority of the same Act, the owner of the *Commonwealth* filed a cross libel. Both claimed interest. The court, devoting but a few meager sentences to the question of interest, announced its holding in the following language:

> The Private Act does not regulate merely the action by the New England Steamship Company; it expressly covers both actions; it provides for judgment or decree either for or against the United States upon the same principles and measure of liability as in like cases in admiralty between private parties.
>
> Concededly, if both were private parties, interest would be allowed; the United States asserts its right to interest, but it denies the counter right. In my judgment, if the United States is entitled to interest, then under the fair construction of the act, a similar right is given to the other party. That the United States is so entitled has not been and can not be denied.

Thus, while the proceeding was instituted under and in accordance with the direction of the statute, which did not provide for interest, the court assumed, without question, that the United States would be entitled thereto—giving no thought to the possible exclusiveness of the remedy so provided or the effect upon general principles otherwise applicable—and then made this assumption the basis of its holding that "if the United States is entitled to interest * * * a similar right is given to the other party."

An appeal was taken by the United States but was abandoned upon entry of a consent decree, without interest—certified to Congress (House Doc. 632, 68th Cong. 2d Sess.) with the following explanation:

> * * * The District Court allowed interest from January 17, 1913, although the special act under which the cross libel was filed made no mention of interest. Before the appeal was perfected the owners of the *Commonwealth* offered to concede to the Government the amount of interest, approximately $4,000, provided the appeal was withdrawn. In view of the concession to the Government of about $4,000, the department determined that the appeal be withdrawn.

The foregoing decision was by Judge Mack. In *New York & Cuba Mail S. S. Co.* v. *United States*, 300 Fed. 827, District Judge Winslow declined to follow it, and disallowed interest without comment. In *Texas Co.* v. *United States*, 11 F. (2d), 981, Judge Goddard allowed interest. He held that if the United States, under the private Act, may demand damages it is entitled to interest, and that if it had a right to claim interest, then, regardless of whether it did or not, the private libelant might do so.

And this, it will be remembered, is based upon a mere assumption of a district judge on a proposition which was not controverted before him. Whether or not the United States when proceeding under such an Act is entitled to interest would seem

in itself a question worthy of consideration. If it may demand interest, it does not necessarily follow that the private libelant may do so. *United States* v. *Verdier*, 164 U. S. 213, 218; *United States* v. *North American Co.*, 253 U. S. 330, 336.

The Circuit Court of Appeals, Second Circuit, reversing the decision of Judge Winslow and affirming that of Judge Goddard, awarded interest in both cases. It recognized the need of statutory authority, but thought this might be inferred from the intention (which it professed to find) that the principle of *restitutio in integrum* should apply.

It relied upon *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453 (prize cases); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299 (a "just compensation" case); and *United States* v. *The Thekla*, 266 U. S. 328—which are discussed *infra* (pp. 46, 48), together with others of the same type cited by petitioner. In all, it will be observed, the facts and applicable principles differ materially from those here under consideration.

But the chief fault of the opinion in *New York & Cuba Mail S. S. Co.* v. *United States* is that it gave no consideration whatever to the long series of private Acts, similarly worded, the policy of Congress, and its long-continued acquiescence in and reliance upon the judicial construction placed upon the language used time after time, often under circumstances utterly inconsistent with the theory that allowance of interest was intended. In

fact, it is apparent, as suggested below, that the court was not fully and properly advised concerning them.

III

If We Ignore the Construction Placed Upon These Statutes as a Whole, and Test the Isolated Words and Phrases Thereof by General Principles, as Petitioner Has Done, Even Then They do not Contain Language Sufficient to Include Interest

(a) "Damages" and "interest" are distinct terms, well understood in admiralty; interest, when awarded (in the discretion of the court), is awarded as interest and by that name

In the first place, we must accept the principle that there is a distinction between damages and interest, allowance of which is a matter of discretion and dependent upon the circumstances of each case. *The Scotland*, 118 U. S. 507, 518, 519—

> The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. * * * *In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included.* [Italics supplied.]

And, to the same effect, see *The Maggie J. Smith*, 123 U. S. 349, 356; *The Albert Dumois*, 177 U. S. 240, 255; *Eastern S. S. Corp.* v. *Great Lakes Dredge*,

etc., Co., 256 Fed. 497, 505; 1 Corpus Juris 1362, and cases cited.

No authority cited by petitioner rejects this rule; some expressly declare it; and their cumulative effect is, not that "interest is to be awarded," but that it *may* be awarded (between private parties).

The Umbria, 166 U. S. 404, 421, did not consider whether or not interest *should* be allowed, but held that recovery was "limited to the value of the vessel, with interest thereon," etc.—that "probable profits of a charter party" should not be allowed—which was the real issue.

But petitioner concedes (old brief, p. 13) that—

> * * * discretion exists in reference to the disallowance of interest in all tort cases, whether maritime or non-maritime * * *.

As concerns maritime cases, this statement is amply supported by the following authorities (cited in petitioner's old brief, pp. 7–12).

Sutherland on Damages (4th ed.):

> SEC. 1290. * * * While the measure of damages for loss of a vessel is, in the first instance, the market value, in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost. * * *
>
> SEC. 1294. * * * Interest on the value of the vessel or cargo is recoverable from the date of the casualty, unless there is a recovery on some other basis than that of

> the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion. * * *

Benedict on Admiralty (5th ed.), Sec. 419:

> The allowance of interest on damages in cases of collision, or other unliquidated damages, is always in the discretion of the court * * *

Roscoe on Damages in Marine Collisions (2d ed.), p. 105 (note):

> It should therefore be considered that [in the United States] interest will be allowed according to the discretion of the Court in relation to particular uses and that there is no definite rule on the subject.

The Reno, 134 Fed. 555, 556:

> The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity.

The Kate (1899), Prob. Div. 165, 175:

> If the vessel be under charter it appears to me that a case arises in which the profits under the charter party should take the place of interest, as more accurately representing the loss to the owner. * * * The proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter party, and this is what the learned registrar has allowed.

The Rhode Island, 20 Fed. Cas. 636, 638:

> In adopting, in this instance, interest or a percentage on the value of the boat for the time she was kept out of the libellant's use by means of the collision, I do not assume to lay that down as a particular always to be admitted in determining the damages occasioned by a wrongful collision. I regard it, in the present instance, as a reasonable mode of compensating the party for what is a positive loss to him, and as one which avoids the vague and objectionable valuation of the probable earnings of the boat, had she not been so prevented following her usual employment.

We concede that between private litigants interest usually is awarded, but it is awarded as interest and by that name. Note the decrees in the following cases. The first is a recent one from the Second Circuit, relied upon by petitioner. In the other three, as hereinbefore pointed out, Congress expressly authorized the recovery of "damages, including interest, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties."

Texas Co. v. *United States*, 11 F. (2d) 981:

> That the libellant does recover of the respondents, United States of America, the sum of $12,918.74, *with interest thereon at the rate of six per cent* from September 3, 1917, together with costs in the sum of $48.30. [Italics supplied.]

Colonial Navigation Co. v. *United States*, supra:

> That libellant * * * owner of and from respondent * * * the sum of $22,305.83, *the amount of the damages sustained by the libellant with interest thereon as set forth in stipulation herein annexed.* [Italics supplied.]

Brooklyn v. *United States*, supra:

> That * * * the libellant above named, recover herein against * * * the Respondent, $2,367.51, *the amount of damages suffered by libellant* * * * *with legal interest thereon* * * *, amounting to* $2,481.76 * * *. [Italics supplied.]

Mallory Steamship Co. v. *United States*, supra:

> That the libellant * * * owner of and from * * * the respondent herein, the sum of $3,775.41, *the damages as found by the court, together with interest thereon at the rate of six per cent per annum* * * *. [Italics supplied.]

It would appear, therefore, that "damages" and "interest" are distinct terms, well understood in admiralty, no less than at law, and that "damages," without more, does not include interest.

Between private parties, an admiralty court may deny interest because of delay (Benedict on Admiralty, 5th ed., sec. 429); and this keeps the amount of interest within reasonable bounds. The rule would seem impossible of application, however, to cases against the Government under Special Acts, so that interest would sometimes accrue

claiming proportions, as in *Pound* v. *United States*, *supra*, where forty-two years' interest was claimed.

Even in the case at bar, if between private parties, both interest and costs might have been denied because of four years' delay in bringing suit. *The James Dr W Disney*, 230 Fed. 951, 955. But can the usual rule be applied? The statute expressly authorizes costs; and suit could not have been filed before Congress had acted. If "damages" include interest, must the court in each case determine whether the claimant or whether Congress was responsible for delay in enacting the statute, or must it arbitrarily award as "damages" a sum perhaps several times the amount of loss actually sustained at the time of the collision?

It should be remembered that the United States is not always responsible, or solely responsible, for delay. Congress is always being importuned in the matter of private claims, many very old and many without merit. A valid claim may be timely presented, and yet its full equitable amount (as Congress would be amply justified in failing at first to be convinced of its merits).

Certainly an admiralty court, attempting to apply the usual rules, could not be expected to weigh all of this. Congress would seem to be the best and only competent judge, and, as heretofore pointed out, has at times authorized payment of interest when the Government has been clearly at fault, as in the case of *Brandies* v. *United States*,

supra, where some ten years were permitted to elapse before a bill was enacted.

As a further distinction between the present case and those cited by petitioner, it may be pointed out that the award of interest on the principal amount of the damage presupposes the existence of a legal obligation from the time of the injury and the withholding by the defendant of a sum of money which (legally) "ought to have been paid to the claimant, and [the defendant] having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable." Sir Charles Butt in *The Kong Magnus* (1891), Prob. Div. 223, 235. In the case of a claim against the Government, however, until Congress has acted and liability has been established as directed by law, there is no legal obligation existent. *United States* v. *Sherman*, 98 U. S. 565, 567—

> Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the

> recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. * * *
>
> * * * It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the government was not bound to pay.

Seeking to avoid application of the maxim, *expressio unius est exclusio alterius*, petitioner argues (old brief, p. 14), that "damages" does not include costs. Roscoe, Damages in Marine Collisions (2d ed.), pp. 64–65, declares costs to be affected by the same considerations applicable to interest and to be comprehended within the rule of *restitutio in integrum*.

Petitioner inquiries (old brief, p. 14): "Can it be supposed that Congress gave this trifle [costs—expressly authorized] yet withheld what is essential to a just and full reparation?" It is necessary only to refer to Secs. 152 and 177, Jud. Code (U. S. C. Title 28, Secs. 258, 284), one of which expressly authorizes costs to suitors in the Court of Claims and the other expressly forbids allowance of interest—indicative of the general policy.

(b) AUTHORITIES CITED BY PETITIONER (OLD BRIEF) HAVE DEALT WITH PRINCIPLES ALTOGETHER DIFFERENT FROM THOSE HERE APPLICABLE

The Charming Betsy, 2 Cranch 64. Captain Murray of the U. S. Frigate *Constellation* was held personally liable for a tortious seizure as prize of war. Interest was allowed without discussion. The report contains a footnote to the effect that Captain Murray was later reimbursed by Act of Congress.

The Anna Maria, 2 Wheat. 327, 335, and *The Amiable Nancy*, 3 Wheat. 546, 560, concerned liability arising out of tortious seizures by privateers owned by American citizens. There is no discussion respecting allowance of interest, and it does not appear what, if any, interest the United States had in the result—the captures being unlawful.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; *The Lubuan*, Blatchford's Prize Cases, 165, and *The Sybil*, *id.* 615, concerned vessels unlawfully seized and libeled in the name of the United States as prizes of war. It would seem that primarily the responsibility was that of the officers who acted without authority of law, as in the case of Captain Murray, *supra*. However, it appears that the United States "voluntarily submitted themselves to the court" and undertook to answer for the officers' wrongs —directly instead of indirectly by subsequent reimbursement. None of them discusses allowance of interest or sheds any light on the question here.

Erskine v. *Van Arsdale*, 15 Wall. 75, was an action against a public officer for money illegally exacted as taxes. The judgment was against the officer personally for a tort committed by him, and the fact that the United States would probably pay the amount of the judgment did not affect the measure of damages. *The Apollon*, 9 Wheat. 362, 377, was a proceeding against a Customs Officer for an unlawful seizure and involved the same principles.

Miller v. *Robertson*, 266 U. S. 243, 257, while recognizing the principle of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603, that a suit against the Alien Property Custodian is, in effect, against the United States, nevertheless allowed interest. The Court carefully pointed out, however, that—

> the claim was not against it [the United States]. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest * * * does not apply.

Standard Oil Company v. *United States*, 267 U. S. 76, 79, allowing interest, is explained by this sentence from the opinion:

> When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.

United States v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220; *Phelps* v. *United States*, *id.* 341, 344; and *Compagnie Generale Transatlantique* v. *United States of America* (Hull No. 5) ——Ct. Cls.——(February 14, 1927), 1927 A. M. C. 485, were proceedings to recover the "just compensation" guaranteed by the Constitution for private property taken for public use. They recognize a difference between proceedings to recover "just compensation" (ascertainment of which was said to be a judicial function) and an ordinary demand or claim against the Government.

United States v. *The Thekla*, 266 U. S. 328, 340, 341, followed in *The Barendrecht*, 11 F. (2d) 377, involved cross libels arising out of a collision with a vessel owned by the United States *pro hac vice* and operated through the United States Shipping Board Emergency Fleet Corporation—which the Court declared might be held liable for interest. The petitioner relies upon the general language contained in the latter part of the following sentence—but refrains from quoting the first part, which seems to indicate a distinction between that case and this:

> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstruct-

> ing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.

United States v. *McKee*, 91 U. S. 442, 450. A claim for money and supplies furnished troops during the Revolutionary War was referred to the Court of Claims with direction that—

> In making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases.

The claim was one of the class provided for by the the Act of August 5, 1790, c. 38, 1 Stat. 178, 179, expressly allowing interest, and would have been brought thereunder except that the period of limitation had run.

CONCLUSION

It is respectfully submitted that the conclusion of the Circuit Court of Appeals is required by the language of this Act, standing alone, when read in the light of accepted canons of construction; is in accord with the evident intent of Congress; and is in harmony with the uniform holdings of the District Courts when construing many private Acts, similarly worded, during a long period of years, acquiesced in and relied upon by Congress when using the same language time after time, often

under circumstances repugnant to any idea that allowance of interest was contemplated.

The decree of the Circuit Court of Appeals should be affirmed.

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OCTOBER, 1928.

APPENDIX A

Unreported Opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*. (Eastern Dist., N. Y., May 7, 1926.)

CAMPBELL, *D. J.*:

[The opinion covers twenty-one typewritten pages. Only that part printed here deals with the matter of interest.]

But one question remains for further consideration and that is whether, as contended by the libellant, this court, under the special act which conferred jurisdiction upon it to try this case, has power to allow the libellant interest from the date of the collision up to the date of the decree.

If the allowance of interest rests in discretion in the case at bar, the reasons for the exercise of that discretion in libellant's favor are convincing.

The question of the allowance of interest in the case at bar, however, is primarily one of law.

No action could be maintained by the libellant in this court for the recovery of any of the damages alleged in the libel if the United States had not, by the statute cited, *supra*, permitted itself to be sued in this court as provided in that statute.

That statute must be strictly construed and this court can not go beyond the letter of such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166; *Reid Wrecking Co.* v. *United States*, 202 Fed. 314; *Reid* v. *United States*, 211 U. S. 529; *United States* v. *Dalcour*, 203 U. S. 408, *The Isonomia*, 285 Fed. 515.)

It is a well-settled principle that the United States is not liable to pay interest on claims against it in the absence of expressed statutory provision

to that effect (*Angarica* v. *Bayard*, 127 U. S. 251), in which case Mr. Justice Blatchford, writing for the court, at page 260 said:

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

As a further evidence of the existence of such rule, reference may be made to Section 177 of the Judicial Code which controls the action of the Court of Claims, and reads as follows:

> SEC. 177. (*No interest on Claims*).—No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

It thus appears that Congress must have expressed its intention to allow interest on the libellant's claim up to the time of the rendition of the decree, or interest must be denied.

Interest is not specifically mentioned in the Enabling Act approved February 16, 1925, under which the suit at bar has been brought, but after describing the claim of the libellant, and conferring jurisdiction on this court sitting as a court of admiralty and acting under the rules governing such court, the said act, in part provides as follows:

> And such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal.

If the suit at bar was between private parties the libellant would, without doubt, be allowed interest. (*The America*, 1 Fed. cases, 285, reversed on other grounds, 92 U. S. 432. *In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916.)

The United States if it prevailed would be entitled to interest, but does it follow as a logical consequence that the converse of the proposition is true?

Libellant contends that it is, and cites *The Commonwealth*, 297 Fed. 651, 654, and *Texas Co. v. United States of America*, unreported opinion of Judge Goddard, District Court, Southern District of New York, Admiralty 81-332, January 29, 1926.

I am not convinced that by the use of the words upon the same "principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided.

Earlier in said Act the jurisdiction of this court is limited as follows:

> To hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States,

A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507) in which case, at page 518, Mr. Justice Bradley, writing for the court, says:

> The allowance of interest on damages is not an absolute right.

Therefore, by the use of the words "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

I do not think it makes any difference whether or not the United States is claiming interest in the case at bar, as suggested in *Nantasket Beach Steamboat Co.* v. *United States*, 297 Fed. 656, although if the reasoning of that opinion be accepted, it is exactly in point and justifies the denial of such interest in the case at bar; but my decision is based on the ground that this court is concluded by the Enabling Act, *supra*, and that under that Act this court is not empowered to allow such interest.

APPENDIX B

STATUTES CONFERRING UPON THE HEADS OF EXECUTIVE DEPARTMENTS AUTHORITY TO "ADJUST AND DETERMINE THE AMOUNTS DUE" ON SMALL CLAIMS ARISING OUT OF COLLISIONS WITH PUBLIC VESSELS, ETC.

(These statutes are listed in Senate Report No. 941, 68th Congress, second session, January 26,

1925, pages 9, 13, and 15. The report contains a brief history of this class of legislation and an indication of the large number of claims arising.)

June 24, 1910, c. 378, 36 Stat. 605, 607; Secretary of the Navy; collision claims not exceeding $500.

June 25, 1910, c. 382, 36 Stat. 630, 676; Chief of Engineers, on approval of Secretary of War; collision claims, river and harbor works, not exceeding $500.

June 17, 1910, c. 301, 36 Stat. 534, 537; Commissioner of Light-houses, on approval of Secretary of Commerce; collision claims, vessels of the Light-house Service, not exceeding $500.

August 24, 1912, c. 391, 37 Stat. 569, 586; Secretary of War; claims for damages to vessels, wharves, etc., due to military operations, etc., not exceeding $1,000.

April 18, 1918, c. 57, 40 Stat. 532; Any officer designated by the President, under regulations of the Secretary of War; claims for damages caused by American military forces abroad (no limitation of amount).

July 1, 1918, c. 114, 40 Stat. 704, 705; Secretary of the Navy; claims for damages to property of non-enemy persons abroad, during the period of the war, not exceeding $1,000.

June 5, 1920, c. 240, 41 Stat. 948, 965; Auditor for the War Department, upon approval and recommendation of Secretary of War; claims for damage to private property incident to training, practice, operation, etc., of the army; repeated in subsequent Appropriation Acts; limited to $500, by Act of June 30, 1922, c. 253, 42 Stat. 716, 725, which substituted the General Accounting Office for the Auditor for the War Department.

June 5, 1920, c. 256, 41 Stat. 1054: Superintendent of the Coast and Geodetic Survey, on approval of Secretary of Commerce; all claims for damages, not exceeding $500.

December 28, 1922, c. 16, 42 Stat. 1066: Amending Act of June 24, 1910, *supra*, and authorizing Secretary of Navy to adjust collision claims arising since April 6, 1917, not exceeding $3,000.

December 28, 1922, c. 17, 42 Stat. 1066: Authorizing the head of each department and establishment of the Government to adjust claims for damages to private property arising after April 6, 1917, not exceeding $1,000.

Most of the foregoing statutes direct that the claims adjusted shall be reported to Congress through the Treasury Department. The Act of July 7, 1884, c. 334, 23 Stat. 236, 254 (U. S. C. Title 5, Sec. 266) provides that:

> The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant * * * to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective houses for consideration.

No interest is allowed on collision claims adjusted under these statutes, as indicated by the records of the various departments and by letters addressed to the Attorney General from the officers, and bearing the dates indicated below.

> Secretary of the Treasury, October 4, 1928.
> Secretary of War, October 4, 1928.
> Secretary of the Navy, October 2, 1928.
> Secretary of Commerce, September 22, 1928.